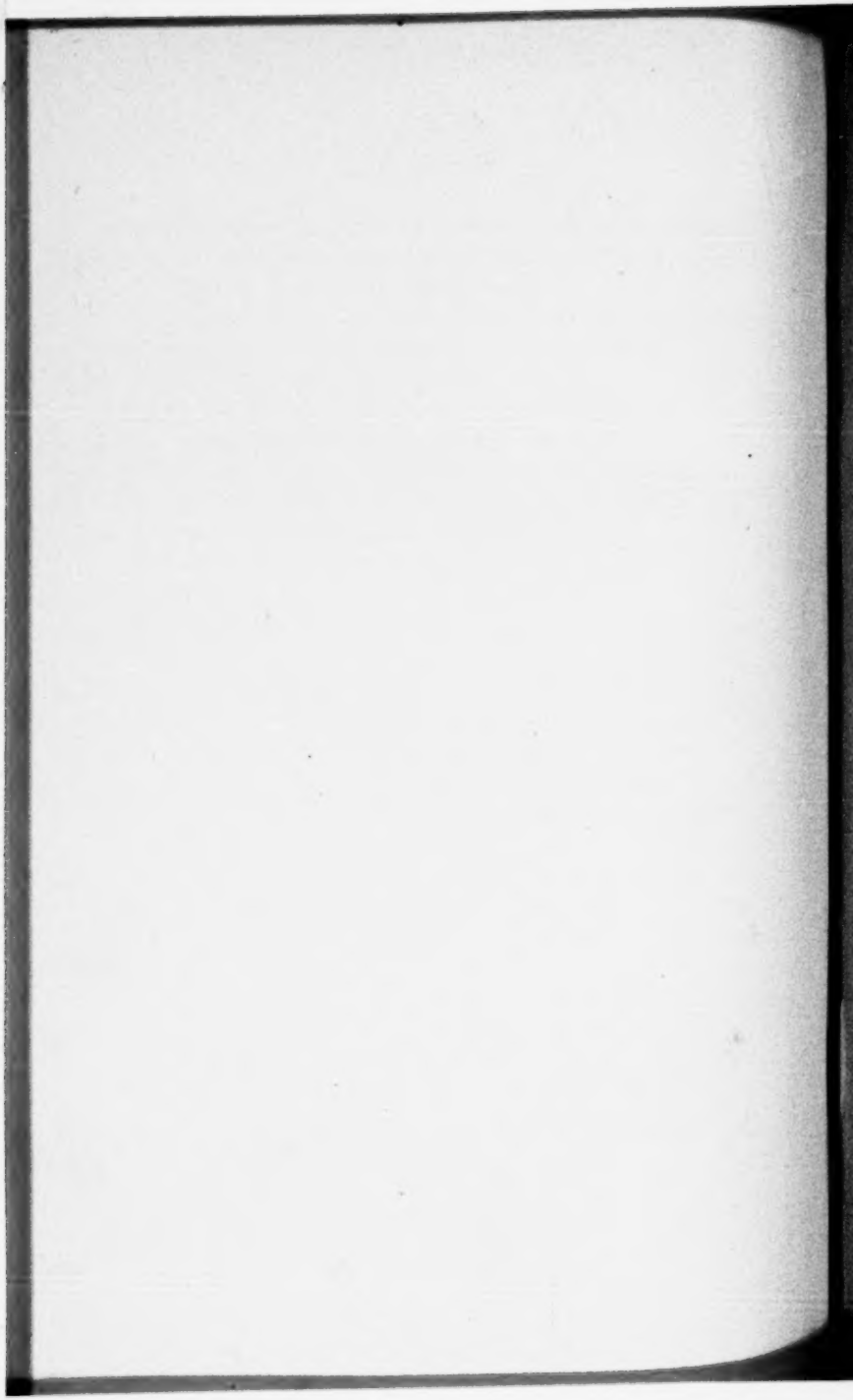

No. 251.

By. of Blair & Wilson for Appt

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In the Supreme Court of the United States.

OCTOBER TERM, A. D. 1900.

OBERLIN M. CARTER, on the Petition of I. Stanton Carter,
Petitioner,
vs.
ROBERT W. McCLAUGHRY.

Appeal from the United States Circuit Court for the District of Kansas.

BRIEF ON BEHALF OF APPELLANT.

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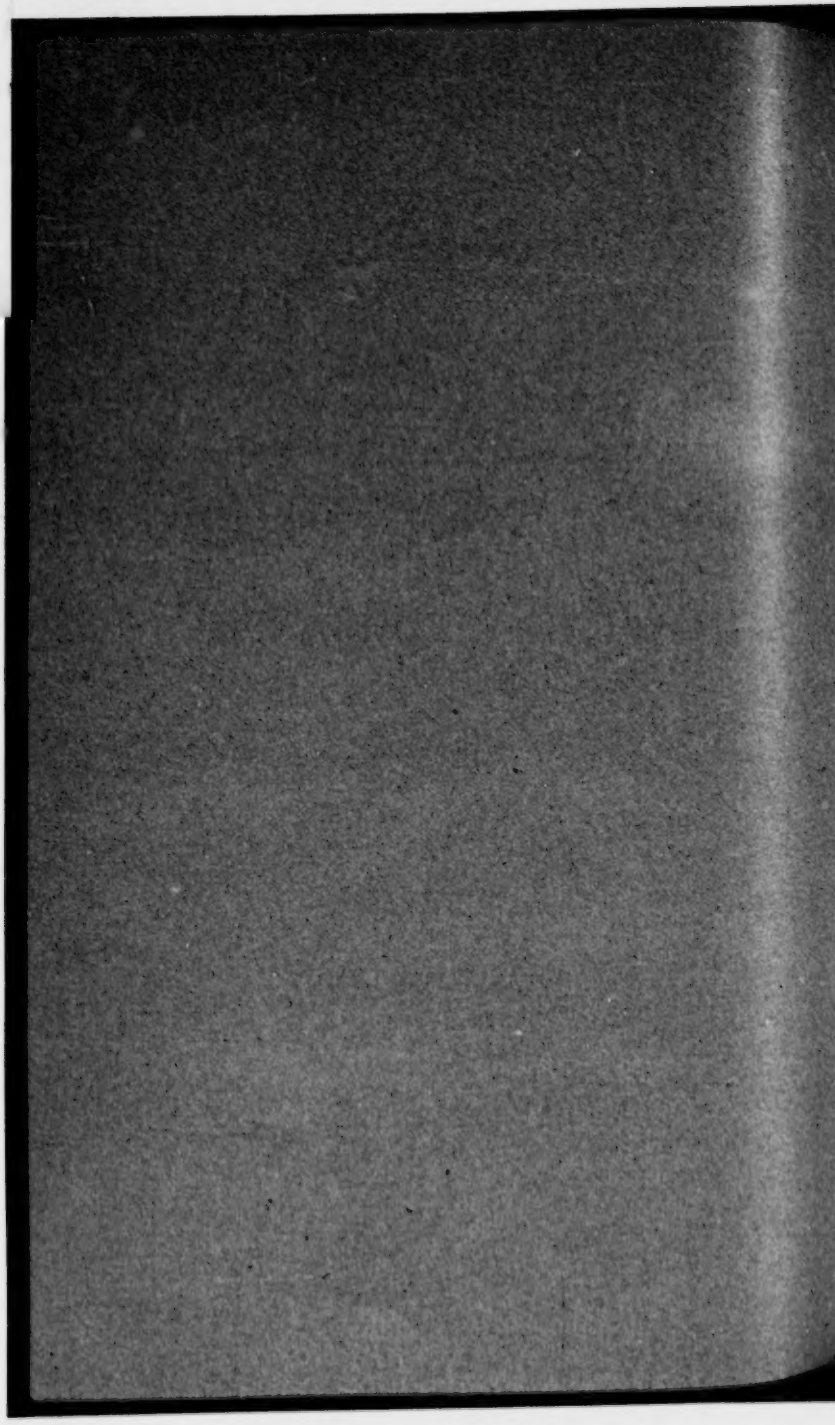

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ROBERT W. McCLAUGHRY.

Appeal from the United States Circuit Court for the District of Kansas.

STATEMENT.

This was a petition for the writ of *habeas corpus* addressed to the United States Circuit Court for the District of Kansas, in behalf of Oberlin M. Carter, late Captain U. S. Corps of Engineers, alleged to be unlawfully confined in the United States penitentiary at Fort Leavenworth, Kansas.

The petition sets out the fact of imprisonment of said Carter, under a sentence of a general court-martial (which sentence was that said Carter be cashiered the army, with publication of his offense; that he be fined $5,000; and that he be imprisoned at hard labor in the

penitentiary for a term of five years) and the approval by the President of such sentence.

The petition then copies in *hæc verba* the mittimus as embraced in General Orders No. 172, Headquarters of the Army, A. G. O., September 29, 1899.

These orders set forth the thirty-seven specifications, grouped under four charges, upon which Capt. Carter was arraigned before said court-martial; his plea of limitation to seventeen of such specifications, sustained by the court; his plea of "not guilty" as to the remaining twenty; his acquittal by the court of four, and conviction by it of the remaining sixteen specifications, arranged under the four charges; the sentence as above mentioned; the order of the President disapproving the findings of the court-martial as to twelve of the sixteen specifications; the approval of the remaining four, one under each charge; the approval of the sentence as imposed by the court-martial.

The petition then avers that Capt. Carter has been ordered dismissed from the army; that his offense has been published in certain newspapers; that he has paid the fine of $5,000 imposed by the court-martial; and that he is now undergoing imprisonment.

It is then alleged that said imprisonment is illegal and void for the following reasons:

First: There was no evidence whatever adduced before the court-martial tending to show that Carter was guilty of any offense.

Second: The finding of guilty by said court on the specification under charge IV is void, because:

(A) The specification and the evidence adduced before the court-martial show that the money alleged to

have been misapplied within the meaning of Sec. 5,488, R. S. U. S., was not so misapplied, but was, on the contrary, paid out for a purpose authorized by law.

(B) An inspection of the specification under said charge IV discloses that the offense charged by said specification was not justiciable under said charge, but if any offense is thereby charged it is a violation of the 60th article of war.

Third: The imprisonment of said Carter is void, because in violation of the fifth amendment to the constitution of the United States.

(*a*) It appears from an inspection of the charges and specifications and from the evidence before the court-martial that the basis of each charge and specification is a single act—viz., the drawing and delivering of the same two checks, and that the same act has been split up into four several distinct offenses and a punishment imposed for each offense.

(*b*) Under article of war 60 the court-martial has jurisdiction to inflict as punishment a fine *or* imprisonment, *or* some other punishment, in the alternative, and not cumulatively; and hence the imprisonment under the allegations is in excess of the court's powers, and void.

(*c*) Under article 61 the court had jurisdiction to cashier only.

(*d*) The facts set out in the specifications show that the offense committed, if any, was punishable under the 60th and not under the 62d article of war, which latter provides for the alternative punishment above mentioned.

The conclusion drawn from the foregoing under (B) is that petitioner has necessarily been twice punished for

the same offense, this being in violation of the constitutional inhibition.

Fourth: The sentence of imprisonment is void because inflicted after said Carter had ceased to be amenable to military jurisdiction.

Fifth: The sentence of imprisonment is void because under the presidential order of March 20, 1895, and the army regulation of October 31, 1895, the court-martial could not imprison the defendant to exceed four years.

Sixth: The entire sentence is void, because the court-martial having convicted the defendant of sixteen specifications, alleging nine different and distinct offenses, and the President having disapproved the findings of guilty as to twelve thereof, charging eight different offenses, and having approved the findings as to only four, charging a single offense, the sentence, as approved, was no longer the sentence of the court-martial, but became a greater and more onerous punishment than was imposed by the court for the specifications approved.

In an amendment to the petition the fact of the indictment of Capt. Carter with Greene and others for the same acts as set out in the charges and specifications here under consideration is alleged, which indictment was found subsequent to the first application for a writ of *habeas corpus* by Capt. Carter, hereinbelow referred to.

The petition concludes by setting out the proceedings very briefly of a previous application by said Carter in the Southern District of New York and the action thereon by the Circuit Court of Appeals and this court on said application.

The writ prayed for in the present case was issued by the Circuit Court for the District of Kansas, and a return was duly made thereto.

The return admits the detention of said Oberlin M. Carter by respondent; avers that he is held by virtue of a sentence of a general court-martial, as shown by general orders 172, hereinabove referred to; and attaches said order as an exhibit. The order is the same as set out in full in the petition herein.

The return proceeds to state at length the proceedings in the former application for the writ of *habeas corpus* (being the same proceedings alleged in the petition), and avers the issuance of the mandate of this court in said former proceedings remanding said Carter.

The remainder of the return consists of certain averments of legal conclusions not necessary here to specify.

To this return petitioner demurred, and, on hearing, the Circuit Court remanded the prisoner.

Under the pleadings the following matters were admitted:

The charges and specifications under which Carter was tried by a court-martial convened in January, 1898, at Savannah, Georgia.

The various pleas of said Carter thereto.

The findings of the court-martial on said pleas.

The sentence of the court-martial.

The determination of the President of the United States on said findings and sentence.

The payment by said Carter of the fine of $5,000 adjudged by said court-martial.

The order of the President dismissing said Carter from the army of the United States, and the publication of his offense in certain newspapers, in accordance with 101 Art. of War; hereinafter called his "degradation."

The confinement of said Carter in the penitentiary as alleged in the petition.

The application of said Carter for the writ of *habaes corpus* on October 2, 1899, to the United States Circuit Court for the Southern District of New York, his remand to the custody of the military authorities; the subsequent appeal to the United States Circuit Court of Appeals of the Second Circuit; the affirmance of the holding of the lower court; the petition to this court for *certiorari* and its denial; the appeal to this court from the order of the Circuit Court and its dismissal.

That there was no evidence adduced before the court-martial tending to show any guilt on the part of said Carter.

That the evidence before the court-martial showed that the moneys paid out by Carter as alleged in the specification to charge IV were paid by him "under and in accordance with the specifications of two certain contracts "between the United States of America and the Atlantic "Contracting Company, dated September 8, A. D. 1896, "for the improvement of Savannah Harbor and Cumberland Sound, respectively, which said contracts were entered into pursuant to the act of Congress approved "June 3, 1896."

That under the act of Congress approved September 27, 1890, the President, by an order dated March 20, 1895, fixed the maximum punishment for a violation by an enlisted man of the United States army of the 60th article of war, and also for a violation by such person of the 62d article by embezzlement of more than $100, at a term of four years confinement at hard labor, under each article.

That the President also promulgated on October 31, 1895, certain army regulations, and among them, "Art. 938. Whenever, by any of the articles of war, "punishment is left to the discretion of the court, it "shall not, in time of peace, be in excess of a limit "which the president may prescribe The limits so "prescribed are set forth in the manual for courts-mar- "tial, published by authority of the secretary of war."

That the limits above mentioned are the limits prescribed in said Manual, and that article 938 above set out was in force when said court-martial passed sentence on said Carter.

That since the first application for the writ of *habeas corpus* in behalf of said Carter was made, said Carter, with Greene and others, was indicted by the Federal grand jury at Savannah, Georgia, for conspiracy, based on substantially the same facts set out in specification 2 under charge I; and that the exhibit to the amendment to the petition herein is a true copy of such indictment.

The charges and specifications on which it was finally determined by the president that appellant was guilty, are as follows:

Charge I. Conspiracy to defraud the United States, in violation of the 60th article of war.

Specification 2. "In that Captain Oberlin M. Carter, "Corps of Engineers, United States Army, devising and "intending to defraud the United States and to aid the "Atlantic Contracting Company, a corporation, and John "F. Gaynor, William T. Gaynor, and Edward H. Gay- "nor, and Anson M. Bangs, and divers other persons, "all of whom were likewise with him, the said Carter, "devising and intending to defraud the United States,

"did, with the corporation and persons named, unlaw-
"fully combine and conspire to defraud the United
"States of divers large sums of money by aiding
"the said the Atlantic Contracting Company, to ob-
"tain the allowance and payment of certain false
"and fraudulent claims hereinafter described; and in
"pursuance of the said conspiracy the said Oberlin
"M. Carter, in the months of June, July and August,
"September and October, 1896, being an officer of the
"United States in local charge of the river and harbor
"district usually called the Savannah District, and of
"the improvement by the United States of rivers and
"harbors in said district, did, with the knowledge and con-
"sent of the said other parties named, so advertise for
"proposals for contracts for certain works of improve-
"ment in the harbor of Savannah, Georgia, in said dis-
"trict, and so manage and conduct said advertising and
"the matter of giving out information in regard to the
"contract to be let, and the matter of receiving proposals
"and awarding the contract as to enable the said the At-
"lantic Contracting Company to secure the contract for
"said work, and to have the same entered into by the
"United States with it October 8, 1896; and in further
"pursuance of the said conspiracy the said the Atlantic
"Contracting Company, afterwards, to-wit, from about
"the 8th day of October, 1896, to July 31, 1897, did fur-
"nish and put into sa d work certain mattresses, stone and
"other material which were different in kind and character
"from the mattresses, stone and other material contracted
"for in said contract, and very much less costly to the said
"the American Contracting Company, as well as of less
"value to the United States; which said mattresses, stone
"and other material so furnished and put into the work

"the said Capt. Carter, in further pursuance of said con-
"spiracy, did receive and accept, and cause to be received
"and accepted, for the United States, as and for the mat-
"tresses, stone and other material contracted for; and did,
"on or about July 6, 1897, cause to be paid out of the
"moneys of the United States, $230,749.90 to the said
"the Atlantic Contracting Company, on account of the
"said furnishing and delivery of the same, and as if the
"said mattresses, stone and other material had been such
"as were stipulated for in the contract, and at the same
"rate, cost and price as if they had been.

"And in further pursuance of the said conspiracy the
"said Capt. Carter, about June, July, August, September
"and October, 1896, did advertise for proposals for a con-
"tract for improving Cumberland Sound, Georgia, in said
"river and harbor district, and so manage and conduct the
"matter of such advertising, and the matter of giving out
"information in regard to the contract to be let, and the
"matter of receiving proposals and awarding the contract,
"as to enable the said the Atlantic Contracting Company
"to secure the contract for said work, and to have the
"same entered into by the United States with it October 8,
"1896; and in further pursuance of the said conspiracy,
"the said the Atlantic Contracting Company from
"about the 8th day of October, 1896, to the 31st day of
"July, 1897, did furnish and put into said work certain
"mattresses, stone and other material which were differ-
"ent in kind and character from the mattresses, stone
"and other material contracted for in said contract, and
"very much less costly to the said the Atlantic Con-
"tracting Company, as well as of less value to the United
"States; which said mattresses, stone and other material
"so furnished and put into the work the said Captain

"Carter, in further pursuance of said conspiracy, did re-
"ceive and accept, and cause to be received and ac-
"cepted, for the United States, as and for the mattresses,
"stone, and other material contracted for; and did, on
"or about July 6, 1897, cause to be paid, out of the
"moneys of the United States, $345,000 to the said
"Atlantic Contracting Company, on account of said
"furnishing and delivery of the same, and as if the said
"mattresses, stone and other material had been such as
"were stipulated for in the contract and at the same
"rate, cost, and price as if they had been.

"This on the 6th day of June, 1896, and thereafter
"to the 1st day of August, 1887."

Charge II. "Causing false and fraudulent claims to
"be made against the United States, in violation of the
"60th article of war.

Specification 4. "In that Captain Oberlin M. Car-
"ter, Corps of Engineers, United States Army, being
"at the time the officer in local charge of river and har-
"bor improvements in the Savannah river and harbor
"district, did cause to be made certain false and fraud-
"ulent claims against the United States and in favor of
"the Atlantic Contracting Company, a corporation,
"knowing the same to be false and fraudulent, to wit:
"The claim represented by the following voucher, sub-
"mitted by the said Captain Carter with his accounts
"and marked, 'Appropriation for improving harbor at
"'Savannah, Georgia':

"Voucher No. 8, $230,749.90, July, 1897;
"and the claim represented by the following voucher
"submitted by the said Captain Carter, with his accounts,
"and marked 'Appropriation for improving Cumber
"'land Sound, Georgia and Florida':

"Voucher No. 9, $345,000, July, 1897;
" which said false and fraudulent claims the said Captain
" Carter caused to be made by knowingly permitting the
" said Atlantic Contracting Company, which had previ-
" ously entered into contracts, dated October 8, 1896, to
" furnish the United States certain mattresses, stone and
" other material, of specified kinds and qualities, for
" constructing works in said river and harbor districts,
" to furnish and put into said works mattresses, stone
" and other material different from, inferior to, cheaper
" and of less value to the United States than those con-
" tracted for; and by receiving and accepting and paying
" for the same as of the kinds and qualities contracted
" for, and by falsely certifying to the correctness of the
" said vouchers, well knowing that the mattresses, stone
" and other material charged for in said vouchers as hav-
" ing been furnished, had not, in fact, been furnished;
" each of the said claims having been made in or about
" the month named in the above description of the
" voucher relating to it."

Charge III. "Conduct unbecoming an officer and a
" gentleman, in violation of the 61st article of war."

Specification 2. "In that Captain Oberlin M. Carter,
" Corps of Engineers, United States Army, being the
" officer in local charge for the United States of river
" and harbor improvements in the Savannah river and
" harbor district, did wilfully and knowingly cause the
" following amounts to be paid out of the moneys of the
" United States, subject to his order and control as officer
" in charge of said improvements to the Atlantic Con-
" tracting Company, a corporation; the accounts on
" which the same were paid being false, and the amounts
" paid not being due or owing from the United States to

"the said company or to any one, and he, the said Cap-
"tain Carter, well knowing this to be the case; the said
"accounts and amounts paid and the payments being
"those designated by the following voucher (and the
"entries therein and endorsements thereon), submitted
"by the said Captain Carter with his accounts and
"marked 'Appropriation for improving harbor of Sa-
"vannah, Ga.':

"Voucher No. 8, $230,749.90, July, 1897;
"and the one indicated and designated by the following
"voucher (and the entries and endorsements thereon),
"submitted by the said Captain Carter and his accounts
"and marked 'Appropriation for improving Cumber-
"land Sound, Georgia and Florida':

"Voucher No. 9, $345,000, July, 1897;
"each of the said payments having been caused to be made
"on or about July 6, 1897, by the said Captain Carter
"drawing and delivering a check as such officer in charge
"of river and harbor improvements, by which the pay-
"ment was ordered and directed to be made out of the
"moneys of the United States under his control as such
"officer."

Charge IV. "Embezzlement, as defined in section
"5488, Revised Statutes of the United States, in viola-
"tion of the 62d article of war."

Specification 1. "In that Captain Oberlin M. Carter,
"Corps of Engineers, United States Army, being the
"officer in charge for the United States of river and harbor
"improvements in the Savannah river and harbor dis-
"trict, and, as such officer in charge of said improve-
"ments, being a disbursing officer of the United States,
"and having entrusted to him large amounts of public
"money of the United States, did wilfully and know-

"ingly apply, for a purpose not authorized by law, large "sums of the said moneys so entrusted to him, by wil- "fully and knowingly causing the amounts hereinafter "named to be *paid out of the said* moneys which were "subject to his order and control of such officer in charge "of said improvements; the accounts on which the same "were being paid being false, the amounts paid not be- "ing due or owing from the United States to the parties "paid, or to any one, and he, the said Captain Carter, "well knowing this to be the case; the said accounts, the "amounts paid, and the payments being those desig- "nated by the following voucher (and the entries therein "and the endorsement thereon) submitted by the said "Captain Carter with his accounts and marked 'Appro- "priation for improving harbor at Savannah, Georgia':

"Voucher No. 8 ($230,749.90), July, 1897;

"and the one indicated and designated by the following "voucher (and the entries therein and endorsements "thereon), submitted by the said Captain Carter with "his accounts and marked 'Appropriation for improving "Cumberland Sound, Georgia, and Florida':

"Voucher No. 9 ($345,000), July, 1897;

"each of the said payments having been caused to be "made on or about July 6, 1897, by the said Captain "Carter drawing and delivering a check as such officer "in charge of river and harbor improvements, by which "the payment was ordered and directed to be made out "of the moneys of the United States under his control "as such officer."

To recapitulate, condensing, the said charges and specifications allege:

Charge I. Conspiracy in violation of the 60th article of war.

Specification 2. That the accused, being a disbursing officer, did unlawfully conspire, with others named, to obtain the allowance and payment of certain false and fraudulent claims against the United States, by doing, among other things, the following: Accepting materials inferior to those prescribed by the specifications of two contracts, dated October 8, 1896, and by causing to be paid by the United States the sums of $230,749.90 and $345,000 on account of such inferior material.

Charge II. Causing false and fraudulent claims to be paid in violation of the 60th article of war.

Specification 6. That the accused, being a disbursing officer, did knowingly accept materials inferior to those prescribed by contract and did cause false and fraudulent claims to be paid for the sums of $230,749.90 and $345,000.

Charge III. Conduct unbecoming an officer and gentleman, in violation of the 61st article of war.

Specification 2. That the accused, being a disbursing officer, did, knowingly, on certain false accounts, the money not being due or owing thereon, cause to be paid by the United States, $230,749.90 and $345,000.

Charge IV. Embezzlement as defined by 5488 R. S. U. S., in violation of the 62d article of war.

Specification 1. That the accused, being a disbursing officer, did knowingly on false accounts, the money not being due or owing thereon, cause to be applied to a purpose not "authorized by law" $230,749.90 and $345,000, money of the United States.

SPECIFICATION OF ERRORS.

1.

THE FINDING OF "GUILTY" UNDER CHARGE IV AND ITS SPECIFICATION WAS BEYOND THE POWERS OF THE COURT-MARTIAL, AND ILLEGAL AND VOID, BECAUSE:

(A) THE SPECIFICATION WAS WRONGLY LAID UNDER ARTICLE 62, BECAUSE:

(a) *The money was applied to a purpose prescribed by law.*

(b) *The crime charged was not "to the prejudice of "good order and military discipline."*

(B) THE CRIME CHARGED WAS "MENTIONED IN THE "FOREGOING ARTICLES OF WAR."

(a) *It was covered by par. 1 and par. 4 of Article 60.*

(b) *It was covered by par. 9 of Article 60 because it was embezzlement of money "furnished or intended for "the military service." This last is shown:*

(1) By the course of legislation on the subject.

(2) By the fact that the right of Congress to so spend the people's money is derived largely from the war powers.

(3) By the organization of the Corps of Engineers.

(4) By the letter and spirit of Article 60.

II.

IF THE FINDING UNDER ARTICLE 62 IS VOID, THEN THE SENTENCE IS IN VIOLATION OF THE FIFTH AMENDMENT OF THE CONSTITUTION, BECAUSE:

(a) *The sentence is greater than can be imposed for any alleged crime taken singly*, and

(b) *There are only two separate crimes charged, viz., conspiracy and paying fraudulent claims; while there are three several penalties imposed, viz., dismissal, fine and imprisonment. Two have been discharged, viz., dismissal and fine; and hence the third, imprisonment, is illegal.*

III.

THE ENTIRE SENTENCE IS ILLEGAL AND VOID BECAUSE THE PRESIDENT HAVING DISAPPROVED THE CONVICTION AS TO CERTAIN OFFENSES, AND HAVING ORDERED THE ORIGINAL SENTENCE TO STAND, SUCH SENTENCE CEASED TO BE THE SENTENCE OF THE COURT-MARTIAL.

IV.

THE IMPRISONMENT IS ILLEGAL BECAUSE INFLICTED AFTER PETITIONER CEASED TO BE AN OFFICER OF THE ARMY.

V.

THE SENTENCE OF IMPRISONMENT IS VOID BECAUSE IN EXCESS OF THE MAXIMUM ALLOWED BY LAW.

VI.

THE COURT-MARTIAL HAD NO JURISDICTION TO TRY PETITIONER, BECAUSE IT STANDS ADMITTED THAT NO EVIDENCE WHATEVER WAS ADDUCED TENDING TO SHOW HIS GUILT.

BRIEF AND ARGUMENT.

Before elaborating the various assignments of error it is deemed not inappropriate to recall to the mind of the Court certain matters relating to the organization, powers and procedure of courts-martial under our law.

They are "inferior courts of limited jurisdiction, "whose judgments may be questioned collaterally."

Exparte Watkins, 3 Pet., 193, 207.
Runkle v. *United States*, 122 U. S., 543.

They are constituted of a certain number of members, officers of the army, who are judges of both law and fact, and of a judge advocate, who is the legal adviser of the court, and in theory, at least, represents both the prosecution and the accused. In making up its findings, it is the duty of the court to find specifically as to the guilt or innocence of the defendant, separately as to each charge and specification: and the custom is for the court to fix a lumping punishment for all the charges and specifications of which the accused has been found guilty. Neither the findings nor the sentence possesses any validity whatever until the same shall have been passed upon and approved or disapproved, by the proper reviewing authority, and his conclusions promulgated by order duly issued. Such reviewing authority may approve or disapprove any or all of the proceedings or findings, and may confirm in whole or in part the sentence imposed, or may wholly disapprove the same. He may mitigate, or may commute the sentence, in whole or in part, but he may not change the nature of the punishment; neither can he increase it in any respect whatso-

ever. In the event the President is the reviewing authority he may, of course, exercise his prerogative of pardon.

1 Winthrop Mil. Law, pp. 570, 614, 683, 685 *et seq.* (2d Ed.), and authorities therein cited, *passim.*

The adjective and substantive law governing these Courts is derived from three different sources:

First. The positive statutory enactments by Congress, made under the authority of the constitution of the United States, commonly known as the Articles of War.

Second. The army regulations, which are promulgated by the secretary of war, under and by the authority of the president.

Third. The unwritten military law. It is from this last source that the adjective law is for the most part derived; and it consists of the custom of war and the usages or customs of the service. It is expressly recognized in the 84th article of war as a binding body of law upon courts-martial.

It is also recognized by the Supreme Court of the United States in the case of *Martin* v. *Mott*, 12 Wheat., 19. The opinion in the case was delivered by Mr. Justice Story. On page 35 the following language occurs: "If, then, there be no mode pointed out for the forma-"tion of the court-martial in these cases, it may be asked "in what manner is such a court to be appointed? The "answer is, according to the general usage of the military "service, or what might be not unfitly called the cus-"tomary military law. It is by the same law that courts-"martial, when duly organized, are bound to execute

"their duty and regulate their modes of proceeding, in "the absence of positive enactments. Upon any other "principle courts-martial would be left without any ad- "equate means to exercise the authority confided to them; "for there could scarcely be formed a positive code to "provide for the infinite variety of incidents applicable "to them."

This unwritten military law is to be found chiefly in the approved text books on the subject of military law or courts-martial; and it is sometimes preserved in the memory of older officers of the service.

If, then, any point is substantially agreed on by the approved text writers, it may be safely concluded that such is the unwritten or customary law. It is, perhaps, unnecessary to state that when the evidence of such custom is found in the manner indicated, and the custom is not obnoxious to any of the existing written military law, then, so far as that custom is applicable to the case in hand, it has all the binding force of a statutory enactment.

The indictment before such a body is called generically the "charge." This charge consists of two parts: *First*, the charge (used in its narrower sense), and, *second*, the specification. The first sets forth the offense in general terms, usually the mere statement: "Violation of the —— Article of War." The specification sets forth the facts constituting the particular offense.

Manual for Courts Martial, p. 15.

The charge proper is simply the pleader's notion of the legal effect of the facts alleged in the specification, and is a mere conclusion of law. Thus, if a specification be laid under an article of war defining a specific

offense, the court-martial, if the proof fails to make out the offense named, may, and should, find the accused not guilty of the particular charge, but guilty of violating some other article of war defining a lesser degree of the same crime, or guilty under the general article; that is to say, under the 62nd. For example, if the charge be desertion, in violation of the 47th article, the court may find the accused not guilty of that charge but guilty of absence without leave in violation of Article 32; or, if the charge be suffering military stores to be damaged in violation of Article 15, and the court find the damage was not *wilfully* suffered, it may, if the proof justify it, find the officer not guilty under that Article, but guilty of conduct to the prejudice of good order and military discipline in violation of Article 62.

Manual, p. 48.*

It is the custom of the service, in preparing charges, to group all specifications describing the same class of offenses under one charge, instead of repeating the charge with each specification; as for example, the twenty-three specifications under charge 3 in the proceedings against Capt. Carter. This is merely to avoid useless repetition, but the charge must be taken separately in connection with each specification, for no charge (in its broad sense) is complete unless the specification be laid under a charge (in its narrower sense). The elision of the charge where there are two or more specifications is on the same principle that authorizes a pleader to refer to a former count in an indictment for matter elaborated in such count, and

*It should be noted that the "Manual for Courts-Martial," cited *passim* in this brief, has the force of law, for it is promulgated by the Secretary of War under his general powers to provide rules for the government of the army.

thus save the labor of repeating lengthy allegations in each of several subsequent counts.

It was well stated by counsel for respondent below in his brief: "A specification cannot be separated from the "charge. The two must be considered together."

"However inartificial a pleading may be," says the Digest, "it will probably be held sufficient as a legal "basis for a trial and sentence, provided that the "charge and specification taken together amount to a "statement of a military offense, either under a specific "Article or under the general Article."

Dig. Op., J. A. G. (Winthr.), p. 146.

I have been thus particular in the description of military pleadings, because the learned judge below seems, in his opinion, to have labored under a misapprehension in regard to this matter.

It is, of course, conceded at the outset, that the application for the writ of *habeas corpus* cannot be used as a substitute for a writ of error. The authorities in this court, as well as generally, are numerous to that effect. To state the same proposition in other language, it is admitted that no mere error or irregularity in the proceedings of the court-martial can be taken advantage of in this appeal.

Unless I can convince this Court that the military tribunal acted beyond its power in such manner as to render its sentence void, in whole or in part, this proceeding must fail. The court-martial must have exceeded its jurisdiction, somewhere along the line, or appellant cannot prevail.

In determining the question of jurisdiction, however, this court is not limited to a mere inspection of the find-

ing and sentence of the court-martial. It may examine any facts before it, not in contradiction of the record, and if those facts disclose a want of power in the military tribunal to inflict the sentence under any or all of the charges, then I submit that sentence must be held a nullity.

In *ex parte Mayfield*, 141 U. S., 107, this court, speaking by Mr. Justice Brown, said: "This court has held, "however, in a multitude of cases, that it had power to "inquire 'with regard to the jurisdiction of the inferior "court, either in respect to the subject-matter or to the "person, even if such an inquiry involved an examina- "tion of facts outside of, but not inconsistent with, the "record.'" Citing: *Ex parte Carll*, 106 U. S., 521; *Ex parte Bigelow*, 113 U. S., 328; *In re Nielson*, 131 U. S., 176; *In re Cuddy*, 131 U. S., 280.

In the Mayfield case (*supra*) the fact on which the jurisdiction of the United States court depended was the citizenship of the defendant. The indictment was silent as to that, but the petition for the writ of *habeas corpus* alleged petitioner's Indian blood and Cherokee citizenship, and the same was admitted on the hearing. Petitioner was discharged.

In the Nielsen case (*supra*) the defendant in the criminal proceedings (petitioner in the *habeas corpus* case) had been convicted under the Edmunds act for unlawful cohabitation, and was subsequently proceeded against for adultery under the provisions of the act of March 3, 1887. He pleaded that the latter offense formed part of the continuous crime for which he had already been punished, setting out the facts at length. His plea was overruled, and a conviction followed. The prisoner then filed

his application for the writ of *habeas corpus*, setting out all the proceedings in his last trial, including the indictment, the plea of *autre fois convict*, and the demurrer of the government to that plea. This court held that the identity of the two offenses appeared by the admissions of the demurrer to the plea; that the adultery was a constituent part of the original crime; and that the plea of former conviction should have been sustained. The petitioner was discharged.

I.

THE FINDING OF "GUILTY" UNDER CHARGE 4 AND ITS SPECIFICATION WAS BEYOND THE POWERS OF THE COURT-MARTIAL, AND ILLEGAL AND VOID.

It will be insisted here that the court-martial had no jurisdiction to convict or to sentence petitioner under the 62nd article of war, because the offense charged and the evidence adduced in support of the allegations show that. if any offense were committed, it was properly chargeable under article 60 and not under article 62.

Proceeding upon the theory that charge 4 and its specification are eliminated from the case, and that the sentence, if valid at all, must be sustained under charges 1, 2 and 3, it will be urged that, except perhaps for the conspiracy alleged under charge 1, the remaining offenses charged are identical.

If this be true, then it will necessarily follow that at least two different and distinct punishments have been meted out for the same offense, in contravention of the 5th amendment to the constitution.

(A) THE SPECIFICATION WAS WRONGLY LAID UNDER ARTICLE 62.

Charge 4 alleges embezzlement as defined in section 5,488, R. S. U. S., in violation of the 62d article of war. Section 5,488 is as follows: "Every disbursing officer "of the United States who deposits any money intrusted "to him in any place or in any manner, except as auth- "orized by law, or converts to his own use in any way "whatever, or loans with or without interest, or for "any purpose not prescribed by law withdraws from the "treasurer or any assistant treasurer, or any authorized "depository, or for any purpose not prescribed by law "transfers or applies any portion of the public money "intrusted to him, is, in every such act, deemed "guilty of an embezzlement of the money so deposited, "converted, loaned, withdrawn, transferred or applied; "and shall be punished by imprisonment with hard labor "for a term not less than one year nor more than ten "years, or by a fine of not more than the amount embez- "zled or less than $1,000, or by both such fine and im- "prisonment.

The specification under this charge is as follows:

"Specification 1. In that Captain Oberlin M. Carter, "Corps of Engineers, United States Army, being the "officer in charge for the United States of river and "harbor improvements in the Savannah river and harbor "district, and as such officer in charge of said im- "provements, being a disbursing officer of the United "States, and having entrusted to him large sums of "money of the United States, did wilfully and knowingly "apply, for a purpose not authorized by law, large sums "of the said moneys so entrusted to him by wilfully and

"knowingly causing the amounts hereinafter named to "be paid out of the said moneys, which were subject to "his order and control as such officer in charge of "said improvements; the accounts on which the same "were paid being false, the amounts paid not being "due or owing from the United States to the parties "paid or to any one, and he, the said Captain Carter, "well knowing this to be the case, the said accounts, the "amounts paid and the payments being those designated "by the following voucher (and the entries and the en-"dorsement thereon) submitted by the said Captain "Carter with his accounts and marked 'Appropriation "for improving harbor of Savannah, Georgia':

"Voucher No. 8 ($230,749.90), July, 1897,

"and the one indicated and designated by the following "voucher (and the entries therein and endorsements "thereon) submitted by the said Captain Carter with his "accounts and marked 'Appropriation for improving "Cumberland Sound, Georgia and Florida':

"Voucher No. 9 ($345,000), July, 189 ;

"each of the said payments having been caused to be "made on or about July 6, 1897, by the said Captain "Carter drawing and delivering a check as such officer "in charge of river and harbor improvements, by which "the payment was ordered and directed to be made out "of the money of the United States under his control as "such officer."

THE SPECIFICATION WAS WRONGLY LAID UNDER ARTICLE 62 BECAUSE:

(*a*) *The moneys were applied to a purpose prescribed by law.*

The allegation in the specification is the application of

public moneys by the accused as disbursing officer to "a purpose not authorized by law" (the statutory language is a purpose not "prescribed" by law), and this constitutes the gravamen of the offense. Unless the moneys were so applied there was no crime under this particular section, and no jurisdiction to punish under Charge IV.

It appears from an inspection of this specification that the two vouchers, numbered 8 and 9, respectively, the payment of which is alleged to constitute the application of public moneys to a purpose not "authorized" (*sic*, prescribed) by law, were marked, the one: "Appropria-"tion for improving Cumberland Sound, Georgia and "Florida"; the other: "Appropriation for improving "harbor of Savannah, Georgia."

The accused is alleged to have been a disbursing officer who issued the vouchers described and caused them to be paid out of public moneys under his control, marking them "Appropriations, etc." The necessary inference is that the "Appropriations" were made by act of Congress for the purpose stated by accused on the vouchers.

If these vouchers were paid out on works done under an act of Congress and from funds appropriated by such act for such improvements, then it follows they were paid out "for a purpose prescribed by law."

It is to be noted that the specification does not allege that there was no such act of Congress; does not allege that no contracts were made under such act for the improvements named; does not allege that the moneys paid were not paid from a fund appropriated by Congress to the improvements in question; but avers that "the ac-"counts on which the same" (the vouchers named) were

paid "were false, the amounts paid not being due or "owing from the United States to the parties paid or to "anyone," and that Captain Carter knew this fact.

If there be any force in the rule of criminal law that indictments should be drawn with some degree of certainty, then it surely follows from the language of the charge and specification here under consideration that there was an utter failure to charge an offense under Sec. 5,488. More than that. It is submitted that the specification itself affirmatively shows that the money mentioned therein was applied to a "*purpose* prescribed by "law."

But the matter is not left in doubt. The petition for the writ of *habeas corpus* alleges: "It was shown by the evi- "dence before said court-martial * * * that the two sums "of money alleged" to have been misapplied "were paid "out by said Carter under and in accordance with the speci- "fications of two certain contracts between the United "States of America and the Atlantic Contracting Com- "pany, dated October 8, 1896, for the improvement of "Savannah Harbor and Cumberland Sound, respectively, "which said contracts were entered into pursuant to the "act of Congress approved June 3, 1896."

This allegation was nowhere traversed in the return, and thus is admitted by the pleadings to be true, as it is true in fact.

Gould on Pl., § 98 (5th Ed. by Heard).
Stephen on Pl., § 132 (Andrew's Ed.).

There was no pretense before the court-martial, and it cannot truthfully be pretended before this court, that no work was done under these contracts. The only contention was that the materials furnished were inferior, as

set out in the specification under charge 1, and less valuable to the United States. Not of no value whatsoever, but simply less valuable. And the allegation of the specification now being considered, that the amounts paid were not "due or owing," is merely the inexpert pleader's common vice of a negative pregnant. He does not aver that no part of the sums were due, but only that the *exact amounts* were not due or owing.

If, then, it be conceded that there was fraud in the execution of the contracts, and that the accused permitted the contractors to furnish greatly inferior and less valuable material for the works, an admission far more damaging to petitioner than the pleadings justify and yet coextensive with the broadest claim of the prosecution, it follows that while some crime may have been committed by the accused, it was not a crime under the clause of section 5,488 set out in the specification.

In short, Congress appropriated the money disbursed for the "*purpose*" of improving Savannah Harbor and Cumberland Sound. The money was applied by the accused to that "*purpose*" and none other. Therefore his offense, if any, was not as charged in the specification, viz., applying it "to a purpose not authorized by law."

The question here discussed goes, as I shall hereinafter show, to the very root of things. It involves the *jurisdiction* of the court-martial. If it appears, either from the language of the specification, or from the evidence adduced before the court-martial, or from both together, that the vouchers mentioned were paid for a purpose prescribed by law, or if the allegations define a crime set out in any other article of war, then the court-martial was wholly without power to convict or sentence the accused under the 62d article of war.

That the court, on *habeas corpus*, may look into the evidence adduced before the tribunal which imposed sentence on the petitioner, to determine if that tribunal had jurisdiction to try and punish, or, as in this case, to examine the pleadings and give due weight to the admissions therein concerning jurisdictional facts, has been heretofore discussed.

Whatever then may have been the offense of Captain Carter, it was not embezzlement as defined in section 5488, and hence the finding of "guilty" of charge 4 was improper.

Such finding was erroneous for the further reason that,

(b) *The offense attempted to be set out in the specification was wrongly laid under article 62, because* it was not "to the prejudice of good order and military discipline."

The 62d article of war is as follows:

"All crimes, not capital, and all disorders and neglects "which officers and soldiers may be guilty of, *to the* "*prejudice and good order of military discipline, though* "*not mentioned in the foregoing* articles of war, are to "be taken cognizance of by a general or regimental, "garrison or field officers' court-martial, according to "the nature and degree of the offense, and punished at "the discretion of said court."

Sec. 1342, U. S. R. S., par. 62.

The crime charged, whatever its nature, must be "to "the prejudice of good order and military discipline," and it must not be "mentioned in the foregoing articles," or it is not justiciable under article 62.

This is the plain meaning of the article above set out, and the proposition is universally conceded by the text writers.

The subject is discussed at considerable length in Winthrop's valuable treatise on Military Law, from page 1122 to page 1126 (2d Ed.). After remarking that the word "prejudice" is used in the sense of "detriment," the author proceeds to the discussion of the meaning of the term "good order." On page 1123 the following statement is made: "The term 'good order,' inas-"much as most of the cases contemplated by the article "are cases of military neglect and disorders, may be re-"garded as referring mainly to order, that is, condition "of tranquility, security and good government of the "military service. Inasmuch, however, as civil wrongs, "such as injuries to citizens or breaches of the peace, "may, when committed by military persons and actually "prejudicing military discipline, be cognizable by courts-"martial as crimes or disorders, the term 'good order' "may be deemed in cases of such wrongs to include, "with the order of the military service, a reference to "that also of the civil community.

"By the term 'to the prejudice,' etc., is to be under-"stood directly prejudicial, not indirectly or remotely "merely. An irregular or improper act on the part of "an officer or soldier can scarcely be conceived which "may not be regarded as in some indirect or remote "sense or manner prejudicing military discipline, but it "is hardly to be supposed that the articles contemplated "such distant effect, and the same is, therefore, deemed "proper to be confined to cases in which the prejudice "is reasonably direct and palpable. It is also to be "noted that the act or duty neglected must be one which "a military person may legally and properly be called "upon to do or perform. A neglect to comply with a "direction to do something not military but civil in its

"nature, an order to perform which would not be a law-
"ful order in the sense of article 23, would not be a
"neglect to the prejudice of good order and military dis-
"cipline."

On page 1124 he continues: "A crime, therefore, to be
"*cognizable* (the italics are mine) by a court-martial under
"this article must have been committed under such cir-
"cumstances as to have directly offended against the
"government and discipline of the military state. Thus
"such crimes as theft from or robbery of an officer,
"soldier, post trader or camp follower, forgery of the name
"of an officer, and manslaughter, assault with intent to
"kill, mayhem or battery committed upon a military per-
"son, inasmuch as they directly affect military relations
"and prejudice military discipline, may properly be, as
"they frequently have been, the subject of charges un-
"der the present articles. On the other hand, where
"such crimes are committed upon or against civilians,
"and not at or near a military camp or post, or in
"breach or violation of a military duty or order, they
"are not in general to be regarded as within the de-
"scription of this article, but are to be treated as civil
"rather than military offenses."

In the Manual for Courts-Martial, which, as before re-
marked, has the force of statutory law wherever it is not
in contravention of the Constitution or some specific act
of Congress, at page 16, par. 7, it is said: "As to whether
"an act which is a civil crime is also a military offense
"no rule can be laid down which will cover all cases,
"for the reason that what may be a military offense
"under certain circumstances may lose that character
"under others. For instance, larceny by a soldier from
"a civilian is not always a military crime, but it may

"become such in consequence of the particular features, "surroundings or locality of the act. What these may "be cannot be anticipated with a sweeping rule, compre- "hensive enough to provide for any possible conjunction "of circumstances. Each case must be considered on its "own facts But if the act be committed on a military "reservation or other ground occupied by the army, or "in its neighborhood, so as to be in the constructive "presence of the army; or if committed while on duty, "particularly if the injury be to a member of the com- "munity whom it is the offender's duty to protect; or "if committed in the presence of other soldiers, or while "in uniform; or if the offender use his military position "or that of another for the purpose of intimidation or "other unlawful influence or object, such facts would be "sufficient *to make it prejudicial to military discipline* "*within the meaning of the 62nd article of war.*"

It is manifest from the context in the last quotation that the commission of the offense "while on duty" means the "duty" of the officer while with his command, or, if detached, while on temporary duty—such "duty," *e. g.*, as is contemplated by the article denouncing the penalty of dismissal against an officer for being drunk on duty. (Art., 38.)

If the rule of the criminal law, in countries subject to Anglo-Saxon jurisprudence, that statutes denouncing penalties must be strictly construed, and cannot be aided by strained inference, have any application to our military criminal code—and it is submitted that a contrary rule would be abhorrent to our developed sense of justice—then the foregoing argument is greatly enforced. To illustrate: in its widest meaning the phrase "the "prejudice of good order and military discipline" would

embrace any possible misconduct of a soldier, no matter where committed nor what the surrounding circumstances. It would cover the personal altercation of a soldier, on furlough, not in uniform and far removed from any military command or reservation. That such interpretation is not the law is fully shown by the quotation from the authoritative Manual, *supra*.

The phrase must, therefore, be given a narrower meaning—a meaning that cannot properly include the offense alleged against Captain Carter under charge IV.

It may not be inappropriate at this point to digress for a moment, for here lies the fundamental vice of the whole proceeding against petitioner.

The case against him was one that a court-martial is peculiarly unfit to try; not because, as a general proposition, its members are not honest and well meaning, not because our army officers are not capable in their profession, but because by training and education they are in nowise prepared for the intelligent handling of such a case. Above all, the archaic procedure of courts-martial renders such a body totally unfit to grapple with complicated problems of engineering and recondite questions of law, such as arose in the trial of Captain Carter.

This procedure has long since been abandoned by all civilized nations. The English, from whom we inherited it, have provided a civil lawyer, trained in his profession (now Mr. Justice Jeune), whose duty it is to preside over the court-martial and pass on all questions of law and of evidence arising during the trial; while the judge-advocate is relegated to the single duty of a prosecuting attorney. Thus the practice is completely assimilated to our trial by jury—the most magnificent triumph of

modern civilization, the unique possession of English and American jurisprudence. The judge-advocate is shorn of his medieval functions; he no longer represents both the accused and the government, at the same time acting as the legal adviser of the court—a position which, in a hotly contested trial such as Carter's, poor human nature is utterly incompetent to fill; in which, as remarked by an old writer (Adye): "If then *he* errs, all may go "wrong."

These remarks, may it please the court, are neither out of place nor *dehors* the record. An examination of the petition herein will disclose that this petitioner was arraigned on thirty-seven specifications grouped under four charges. Of those thirty seven specifications, seventeen were barred on their face by limitations. Notwithstanding the provision of the 10:d article of war that "No "person shall be liable to be tried and punished by a "general court-martial for any offense which appears to "have been committed more than two years, &c.," the pleader deliberately drew seventeen charges against this petitioner, alleging in each facts which affirmatively and distinctly showed each to be within the bar of the statute.

To the civilian lawyer this might appear a trivial thing. Far otherwise is it to a court-martial. For some occult reason the plea of limitations, notwithstanding Mr. Justice Story's eloquent defense of the wisdom of the law in barring, by lapse of time, stale prosecutions; notwithstanding these "statutes of repose" are at once the shield of innocence and the sword against the blackmailer, this plea, I say, is regarded in our army with great disfavor, and almost as tantamount to a confession of guilt. It requires moral courage of no mean order for an accused officer to invoke its protection.

The motive of the special pleader of these unsigned charges is thus not far to seek.

Of the twenty specifications remaining, the accused was acquitted of four, and of the other sixteen, the president disapproved the finding of "guilty" of twelve, because *not supported by the evidence.*

Incalculable injury had been done this petitioner at the outset by the very multiplicity of the charges. Nor was it to be expected that the members of the court-martial, untrained in law, would be able to segregate the testimony adduced under each separate alleged offense, and not carry in their minds one line of evidence over to some charge to which it was wholly irrelevant, to the great prejudice of the accused. That some malign influence was at work clearly appears from the finding of guilty by the court of twelve specifications (charging eight wholly disconnected offenses) out of a total of sixteen, which finding the president, on the recommendation of the attorney general, *disapproved because of failure of proof.*

See Op. Atty. Genl., Sept. 29, 1899.

This digression, it is hoped, is not impertinent. When we reflect on what grave injustice has been possible under this outworn and inadequate procedure; when we call to mind the fate of Admiral Byng, shot, as Voltaire said, "to encourage the others;" when we, with shame, recall the hanging of a woman, in all human probability wholly innocent, and when we reflect that now some ten millions of people, mostly of an alien race, are subject to these tribunals, we may well pause.

It is to the eternal glory of this court and of one of its former members, the petitioner's great advocate, that the illegal sentence was stayed in Milligan's case. To our

dishonor we permitted the hanging of Mrs. Surratt, though Lee had surrendered; though no foe menaced our capital; and though our civil courts were open and jurors there were only waiting to take their seats in the box. "It was simply one of the many instances," says Morse, "furnished by the war, of the homage which necessity "pays to law and which law repays to necessity."

Morse, Life of Lincoln, Vol. 2, p. 351.

It is to be hoped that the feudal age of such homage is past, and that hereafter our courts martial will do homage to law and swear fealty to justice.

(B) THE CRIME CHARGED, IF "MENTIONED IN THE "FOREGOING ARTICLES OF WAR" MUST NOT BE LAID UNDER ARTICLE 62.

(a) *It was clearly covered both by par. 1 and by par. 4 of the 60th article of war.*

The 60th article is as follows (the paragraphs being numbered for convenience):

"Article 60. Any person in the military service of "the United States

"1. Who makes or causes to be made any claim "against the United States or any officer thereof, know- "ing such claim to be false or fraudulent; or,

"2. Who presents or causes to be presented to any "person in the civil or military service thereof, for ap- "proval or payment, any claim against the United States "or any officer thereof, knowing such claim to be false "or fraudulent; or

"3. Who enters into any agreement or conspiracy to "defraud the United States by obtaining, or aiding "to obtain, the allowance or payment of any false "or fraudulent claim; or

"4. Who, for the purpose of obtaining, or aiding "others to obtain, the approval, allowance or payment of "any claim against the United States or against any offi- "cer thereof, makes or uses, or procures or advises the "making or use of, any writing, or other paper, know- "ing the same to contain any false or fraudulent state- "ment; or

"5. Who, for the purpose of obtaining, or aiding "others to obtain, the approval, allowance or payment "of any claim against the United States or any officer "thereof, makes or procures or advises the making of, "any oath to any fact or to any writing or other paper, "knowing such oath to be false; or

"6. Who, for the purpose of obtaining, or aiding "others to obtain, the approval, allowance or payment of "any claim against the United States or any officer thereof, "forges or counterfeits, or procures or advises the forg "ing or counterfeiting or any signature upon any writing "or other paper, or uses or procures or advises the use "of, any such signature, knowing the same to be forged "or counterfeited; or

"7. Who, having charge, possession, custody or "control of any money or other property of the United "States, furnished or intended for the military service "thereof, knowingly delivers or causes to be delivered to "any person having authority to receive the same, any "amount thereof less than that for which he receives a "certificate or receipt; or

"8. Who, being authorized to make or deliver any "paper certifying the receipt of any property of the "United States, furnished or intended for the military "service thereof, makes or delivers to any person such "writing, without having full knowledge of the truth of

"the statements therein contained, and with intent to de-
"fraud the United States, or

"9. Who steals, embezzles, knowingly and wilfully
"misappropriates, applies to his own use or benefit, or
"wrongly or knowingly sells or disposes of any ord-
"nance, arms, equipments, ammunition, clothing, sub-
"sistence stores, money, or other property of the United
"States, furnished or intended for the military service
"thereof; or

"10. Who knowingly purchases or receives in pledge
"for any obligation or indebtedness, from any soldier,
"officer or other person who is a part of or employed in
"said forces or service, any ordnance, arms, equipment,
"ammunition, clothing, subsistence stores, or other
"property of the United States, such soldier, officer or
"other person not having lawful right to sell or pledge
"the same,

"Shall, on conviction thereof, be punished by a fine
"or imprisonment, or by such other punishment as a
"court-martial may adjudge."

1st. The facts set out in the specification to charge IV charge an offense under either Par. 1 or Par 4 of Article 60, at the pleader's option.

The offense described in the specification is that Captain Carter, an officer in the United States Engineer Corps, being in charge of the Savannah engineering district, and being a disbursing officer with funds of the United States under his control, misapplied such funds, because the accounts on which they were paid were false, the amounts paid not being due or owing to anyone, and that Carter knew the accounts were false and the money not due to any person, the misapplication being made by means of two certain vouchers described, which were

paid by checks drawn by said Carter as such disbursing officer. These facts, the pleader alleged, constituted an application of such moneys to a purpose not authorized (prescribed) by law, and hence embezzlement as defined by Sec. 5,488, R. S. U. S. If now we set down in parallel columns the facts alleged in the specification and the essential facts necessary to be proved under paragraphs 1 and 4 of artice 60 above, it will be clearly seen that the offense charged by the specification could, and should, have been laid under said article 60 and under Par. 1 or Par. 4, at the pleader's option.

Article 60, *Par. 1.*	Charge 4, *Specification.*	Article 60, *Par. 4*
Any person in the military service of the United States;	Captain Carter of the U. S. Engineers, a disbursing officer in charge of certain river and harbor improvements;	Any person in the military service of the United States; who
Causing a claim to be made against the United States;	Caused money of the U. S. to be paid out on a claim of the Atlantic Contracting Co., by the use of certain vouchers;	Aids others to obtain the payment of any claim against the U. S., by making any writing;
knowing such claims to be false.	knowing the accounts to be false and the amounts not to be due.	knowing the same to contain any false statement.

It will be seen from the foregoing that the only difference between the 1st and 4th paragraphs, so far as they affect the case at bar, consists in the *means* of making the false or fraudulent claim. In Par. 4 there must be a writing containing a false statement, known by the offender to be false; in Par. 1, no matter how the claim be made, whether orally or in writing, if it be knowingly false, the person in the military service is guilty under the statute. In the case against Captain Carter the pros-

ecutor might have alleged the causing of the false claim to be made, and shown in evidence the alleged fraudulent vouchers and checks; or he might specifically have set out such vouchers and checks as the means whereby the fraudulent claim was preferred; in which event the government, on the trial, would have been restricted to the very means alleged.

Under charge 4, it is alleged that Captain Carter, being a disbursing officer and in the engineer corps, *i. e.*, "in the military service," caused money of the United States to be paid out to the Atlantic Contracting Company, *i. e.*, "caused to be made" a "claim against the United States" (under Par. 1); or aided "others to obtain the payment" of a claim (under Par. 4); on vouchers submitted by Captain Carter, *i. e.*, by making a writing (under Par. 4); Carter "well knowing" the accounts to be false, *i. e.*, "knowing the same to "be false" (under Par. 1), or to contain" a "false statement" (under Par. 4).

The allegation under charge 4 that Captain Carter did "apply for a purpose not authorized by law large sums of money," the property of the United States, is a mere conclusion of law by the military pleader, made, perhaps, with the notion that by such an averment he could bring the offense set out in the specification under section 5,488, R. S. U. S.

It is as if a common law pleader had drawn an indictment charging that A. B. did feloneously, etc., commit mayhem upon the body of C. D. by cutting off his ear. The allegation in the indictment that the act of cutting off the ear is mayhem, of course, does not make it mayhem.

The learned judge below was quite in error in his conclusion that it was the province of the court-martial to determine whether or not the acts described in the specification constituted embezzlement within the meaning of section 5,488, or were prejudicial to good order and military discipline; and that having so determined, its action is not reviewable in a proceeding of this kind.

As I shall hereafter show, the question is one of power, of jurisdiction, and therefore one that can and must be determined on *habeas corpus*. As well might it be said that the court-martial having jurisdiction to pass upon the plea of *autrefois acquit* or *convict*, its decision is final, and this court is without power, on *habeas corpus*, to inquire if the fifth amendment to the constitution has been violated by the overruling of such plea. The vice in the reasoning of the court below is that it failed to recognize the question as being jurisdictional.

Ex parte Nielsen, 131 U. S., 176.

(*b*) *The offense set out in the specification to charge 4 is specifically covered by Par. 9 of article 60, inasmuch as the money alleged to have been embezzled was money "intended for the military service."*

Paragraph 9 reads as follows:

"Who steals, *embezzles, or knowingly and wilfully misappropriates* or wrongfully disposes of * * * any "ordnance, arms, *money* or other property of the United "States, *furnished or intended for the military service* "*thereof*, shall be punished, etc."

It will be conceded that Captain Carter was in the military service, and that he had entrusted to him moneys of the United States. If he paid out such public moneys on false or fraudulent vouchers knowingly, then it fol-

lows that such payment was a "misappropriation" or wrongful disposal of such moneys as that word is used in Par. 9. The specification under charge 4 expressly charges him with applying such moneys to a purpose not authorized by law, that is to say, with a misapplication of the same.

In re Carter, 97 Fed. Rep., 496.

The only question then remaining is whether or not the money under his control was "furnished or intended "for the military service" of the United States as that phrase is used in the article of war.

This is shown:

1. By the whole course of legislation on the subject.

2. Because the very right of Congress to use the people's money for river and harbor improvements is derived largely from the "war powers."

3. The organization of the corps of engineers indicates the same result.

4. The letter and spirit of article 60.

Of these in their order:

1. The course of Congressional legislation on the subject.

The three great departments of our government for the support of which Congress appropriates money are the military service, the naval service and the civil service. R. S. U. S., Sec. 3633.

The war department is "the military branch of the "service."

Dig. Op. J. A. G., 275, Par. 2.

At the outset it is to be observed that the language of the article is not for military service or for military purposes, but for THE military service. This use of the particle "THE" is significant, for it makes the phrase "the military service" a collective noun with a meaning equivalent to "The War Department," with all things coming under it or subject to its control. Thus, it would seem to follow that Congress had in mind moneys furnished or intended for that BRANCH OR ARM OF THE GOVERNMENT SERVICE HAVING IN CHARGE THE EXECUTION OF THE DUTY FOR WHICH THE MONEY WAS APPROPRIATED, and NOT the OBJECT TO BE ACCOMPLISHED.

In the general appropriation for "the military service," we find numerous appropriations for internal improvements and the improvement of rivers and harbors.

In 1819, in the general appropriation act, entitled "An Act making appropriations for the military service "of the United States for the year 1819," is an appropriation "for making survey of the watercourse tributary to and west of the Mississippi," as well as one for marking and running the boundary line of the several cessions of land made by the Indians.

See

U. S. Stat. at L., Vol. 3, pp. 480, 431.

In 1820, in the general appropriation act for that year for "the military service," is an appropriation for completing the public road through the Creek Nation, between the States of Georgia and Alabama, as well as an appropriation for a survey of the Ohio and Mississippi rivers.

U. S. Stat. at L., Vol. 3, pp. 562–3.

In the general appropriation for "the military service" for the year 1821 is a further appropriation for completing the Creek road.

U. S. Stat. at L., Vol. 3, pp.

In the general appropriation for "the military service" for the year 1822 is an appropriation "for the sur-"vey of certain ports and harbors."

U. S. Stat. at L., Vol. 3, pp. 686–688.

In the general appropriation for "the military service" for the year 1825 is an appropriation "for making "surveys and carrying on the operations of the board of "engineers in relation to internal improvements."

U. S. Stat. at L., Vol. 4, p 82.

In the general appropriation for "the military service" for the year 1826 are appropriations for completing the repair of Plymouth Beach and for the continuance of the Cumberland Road, and "for completing the "work of deepening the channel of entrance into the "harbor of Presque Isle;" and also for defraying the expenses incidental to making examinations and surveys preparatory to and in aid of the formation of roads and canals.

U. S. Stat. at L., Vol. 4, pp. 150 151.

In the general appropriation for "the military service" for the year 1827 is an appropriation for constructing the road from Canton to Zanesville, in the State of Ohio, and for continuing and completing the survey of the Cumberland road, and "for completing the works "and deepening the channel of entrance into the harbor "of Presque Isle." And also "for improving the navi-"gation of the Ohio and Mississippi Rivers."

See

U. S. Stat. at L., Vol. 4, pp. 214-6.

In the general appropriation for "the military service" for the year 1828 is an appropriation for a road from Little Rock to Cantonment.

U. S. Stat. at L., Vol. 4, pp. 247-259.

In the general appropriation for "the military service" for the year 1829 is an appropriation "for the "preservation of the point of land forming Province-"town harbor," and "for removing obstructions in the "harbor of Mobile," and "for piers at New Castle."

U. S. Stat. at L., Vol. 4, pp. 248-249.

In the general appropriation for "the military service" for the year 1831 is an appropriation "for completing the Mars Hill road."

U. S. Stat. of L., Vol. 4, pp. 465-467.

And in the general appropriation "for the support of the army" for the years 1841, 1842, 1843, 1844, 1845, 1846, 1849, 1851, 1852, 1853, 1854, 1856, 1858 and 1860, are appropriations for running boundary lines; for arrearages and for the preservation of the public property at the several places of harbor and river improvements; for building and repairing the necessary boats for carrying on the improvements on the Missouri, Mississippi, Ohio and Arkansas rivers; for the preservation and repair of public works heretofore constructed for the improvement of harbors; for the continuance of the surveys of the northern and northwestern lakes; for defraying the expenses of topographical surveys of routes from the valley of the Mississippi to the Pacific Ocean; for continuing the topographical and hydrographical survey

of the delta of the Mississippi, with such investigations as may lead to determining the most practical plan for securing it from inundation; for fuel and quarters, and for mileage and transportation for officers and enlisted men of the army serving on the coast survey; for building an iron steamer to be used in the survey of the northern and north-western lakes; for continuing the exploration and surveys to ascertain the best route for a railway to the Pacific, and for the construction of bridges and the improvements of the crossings of streams on the road from Fort Smith, in Arkansas, to Albuquerque, in New Mexico.

See U. S. Stat. at L., Vol. 5, pages 433–435; pages 508, 510; pages 603–606; pages 745–747; Vol. 9, page 7; pages 370–372; pages 504–507; pages 618–620; Vol. 10, pages 105–107; pages 214–217; pages 576–578–582; Vol. 11, pages 147–150; pages 322–333–336; Vol. 12, page 66; page 466.

By the act of June 28, 1864, entitled "An act to pro-"vide for the repair and preservation of certain public "works of the United States," it was enacted that the sum of $100,000 be appropriated "to be expended under "the direction of the secretary of war in repairing and "rendering useful for purposes of commerce and navi-"gation such of the public works connected with the "harbors on the seaboard of the United States as may, "in his judgment, need such expenditure."

See,

U. S. Stat. at L., Vol. 13, pp. 200–201.

Since that act the statutes authorizing the construction of works of river and harbor improvement have provided that the sums appropriated shall be expended under the direction of the Secretary of War and all works of river and harbor improvement are now expressly assigned by Congress to the War Department for the of the engineer bureau of the army as the executive branch of the government to carry out the same.

See,

See Section 231, R. S. of the U. S.

To facilitate the prosecution of projected improvements, the power is expressly conferred upon the Secretary of War to institute proceedings for condemnation of land or for its purchase, or to receive donations of lands or materials required for the maintenance or prosecution of such works.

See,

Act of April 24, 1888, 25 Statutes at Large, 94.

He is also expressly charged with the application of appropriations for river and harbor improvements and with the letting of contracts for work to be done.

By the act of August 11, 1888, it is provided:

"That it shall be the duty of the Secretary of War to "apply the money herein and hereinafter appropriated "for improvements of rivers and harbors other than "surveys, estimates and gaugings, in carrying on the "various works by contract, or otherwise, as may be "most economical and advantageous to the government. "Where such works are done by contract, such contracts "shall be made after sufficient public advertisement for

"proposals in such manner and form as the Secretary of "War shall prescribe, and such contract shall be made "with the lowest responsible bidders, accompanied by "such securities as the Secretary of War shall require, "conditioned for the faithful prosecution and completion "of the work, according to such contract."

25 Statutes at Large, page 400.

The very appropriation out of which it is alleged the moneys were embezzled by Captain Carter provides, chapter 314: "An Act making appropiations for the "construction, repair and preservation of certain public "works on rivers and harbors, and for other purposes.

"Be it enacted by the Senate and House of Represen-"tatives of the United States of America in Congress as-"sembled, that the following sums of money be and are "hereby appropriated to be paid out of any money in "the treasury, not otherwise appropriated, to be imme-"diately available, and to be expended *under the direction "of the Secretary of War and the supervision of the "Chief of Engineers for the construction, completion, "repair and preservation of the* public works herein-"after named.

"Harbor of Savannah, Georgia; continuing improve-"ment, $5,000; provided, that contracts may be entered "into by the Secretary of War for such materials and "work as may be necessary to complete the project of "further improvement, recommended by Captain Ober-"lin M. Carter, in his reports of December 7, 1894, and "April 1, 1895, and to complete the project for the "steamboat channel between Beaufort, South Carolina, "and Savannah, Georgia, recommended by Captain "Oberlin M. Carter, in his report of December 4, 1895.

"and mentioned in that report as route two; to be paid "for as appropriations may, from time to time, be "made by law, not to exceed the amount of $1,000,000, "exclusive of amount herein or heretofore appro- "priated."

By this series of legislation alone there would seem to be no room for doubt that all moneys appropriated for the improvement of rivers and harbors prior to the year 1864, and assigned to the War Department for execution, and all moneys for those improvements since the year 1864, were considered by Congress as moneys appropriated for "the military service."

The act of March 2, 1895, 28 Stat. L., 787, and Sec. 228 R. S. require the Secretary of War to lay before Congress a statement as to the expenditures in the military establishment. River and harbor works come under this head, and the treasury estimates show that the funds asked for are considered as for "the military service."

The act of April 20, 1897, 18 Stat. L., 33, requires all disbursements by officers in the military establishment to be made by officers of the army. River and harbor funds are inspected by such officers, but NOT any funds which are not for "the military service," such as for lighthouses, etc.

The comptroller of the United States has also considered river and harbor funds as furnished for "the military service," for he has decided that certain purchases cannot be made from appropriation for river and harbor improvements, or from ANY OTHER APPROPRIATION FOR THE MILITARY ESTABLISHMENT. (3 Dig. Comp. Dec., 321.)

Sec. 3417 R. S. U. S. requires all contracts for the

"military service" to be made by the secretary of war. The contracts under which the petitioner disbursed the money in question were made, as shown by the record, by the secretary of war

2. The very right of Congress to use the people's money for river and harbor improvements is derived largely from the war powers of the government.

In the early period of our Republic it was doubted that Congress had any power whatever to expend the general moneys of the people for improvements within the boundaries of individual states. It was conceded that such power did not reside in the Continental Congress; and therefore, since it was not one of the inherent powers of all governments, it must be found, if it existed at all, in the Constitution.

Two clauses of that instrument were supposed to cover it: the war power, and the power to regulate commerce. These powers were not supposed to be co-extensive, as applied to this particular subject-matter, but as the nature or purpose of the improvement varied, so it came more under one or the other of the powers named.

The question, therefore, as to whether or not these moneys were "furnished or intended for the military service" goes to the very root of our institutions, and becomes at once a constitutional question of grave magnitude.

In 1816 Calhoun advocated internal improvements (roads and canals) to be paid for out of the dividends of the government from the Bank of the United States:

V. Abridg. Debates, 682;

and found the constitutional authority principally in the war powers.

V. Abridg. Deb., 705.

Jefferson and Madison in various messages to Congress denied the right; but Congress has steadily appropriated increasing sums for the purpose.

Kent states the right to be derived from the war and commerce powers.

1 Kent, Comm., 268.

3. The organization and duties of the United States engineer corps make it clear that moneys appropriated for river and harbor improvements, and confined to the control of the war department, are, in the contemplation of Congress, "furnished or intended for the military "service."

1st. The engineer corps of the army was constituted by the act of May 9, 1794. It was given no specific duties, but was placed generally under the orders of the president to perform proper services on the coasts or the frontiers.

In 1813 the topographical department of the corps was constituted, clearly indicating that the works of topography and surveys were regarded by Congress as a branch of the service falling within the appropriate duties of the engineer corps.

In 1818 the provisions of the act of February 10, 1807, which authorized the employment of persons in the making of surveys of the coasts other than persons belonging to the army and navy, were repealed.

See

Act of April 14, 1818, U. S. Stat., Vol. 3, page 425.

In 1821, when the army was reorganized, the corps was continued exactly as it had previously existed, and

in 1838 its topographical branch was increased and the employment of civil engineers to aid it was forbidden.

By this legislation it thus clearly appears that Congress early determined that the works of internal improvement could best be carried out by that branch of the military service constituted as the engineer corps.

2nd. The duties of the engineer corps were also early prescribed in the army regulations as covering the execution of river and harbor improvements, which provisions have been continued in the regulations now in force. The duties of the corps of engineers are defined as follows: "The duties of the corps of engineers comprise "reconnoitering and surveying for military purposes; "selection of cities and formation of plans and estimates "for military defenses; construction and repair of fortifi- "cations and other accessories, planning and superintend- "ing defensive or offensive work of troops in the field; "examination of routes of communication, for sites and "for military movements and construction of military "roads and bridges; *execution of river and harbor im-* "*provements* assigned to it, and such other duties as "the President may order."

See Army Regulations, Article 82, Sec. 1,472.

It is also provided: "Engineer officers engaged in the "construction of fortifications or other public works are "entitled to allowances of quarters, mess rooms and "kitchens, with fuel for the same, as are provided by "regulations for officers at garrisoned posts."

See section 1,484.

It is also provided: "Officers of the corps of engi- "neers, or those on engineer duty traveling on service "connected with fortifications or works of public im-

"provement, will be paid their travel allowances *from "the special appropriation for the work.* When travel- "ing on any other duty, the mileage will be paid by that "branch of the service entrusted with such payments for "the army."

See section 1,487.

These regulations were issued by the Secretary of War under direction of the President, and have the force of law.

Speaking of the control of harbor improvements, Mr. Justice MILLER, in *Wisconsin* v. *Duluth* (96 U. S., 379), said: "The operations of the government in this regard "have been conducted by the Bureau of Engineering as "part of the War Department, to which Congress has con- "fided the execution of its wishes in all these matters. "That department has mapped out in suitable geograph- "ical divisions the work thus imposed upon it, and placed "these under the control of officers who are in charge of "them. For many years past Congress has been in the "habit of passing an annual appropriation bill, called the "river and harbor bill, confined to works of this class "exclusively. The money thus appropriated is expended, "as we have said, under the direction of the War Depart- "ment."

See, also,

South Carolina v. *Georgia*, 93 U. S., 4.

There can be no room for controversy or doubt that, from the earliest period of the national government down to the present time, the improvement of rivers and har- bors has always been considered as appropriately belong- ing to *that branch of the military service known* as the corps of engineers.

3rd. The accused was thus performing the very duties expressly enjoined upon him as an officer *in the military service.*

He was subject at all times to the army regulations and received his pay and allowances in accordance therewith.

He disbursed all moneys for rivers and harbors and accounted for all property purchased with said moneys in accordance with those military regulations, and none other.

In nothing that he did as an officer in charge of river and harbor improvements was he in the service of any other department of the government than *the military establishment* or governed by any other rules and regulation than those of *the military service.*

As said by Mr. Justice MILLER: "It is impossible to "hold that men who are by statute declared to be a part "of the army, who may wear its uniform, whose name "shall be borne on its register, who may be assigned by "their superior officers to specific duties by detail as "other officers are, who are subject to the rule and arti- "cles of war, and may be tried, not by a jury as other "citizens are, but by a military court-martial for any "breach of those rules, and who may finally be dis- "missed on such trial from the service in disgrace, are "still not in the military service."

U. S. v. *Tyler*, 105 U. S., 244.

See, also,

U. S. v. *Latourette*, 151 U. S., 572.

U. S. v. *Morton*, 112 U. S., 1.

The duty of an engineer officer on public work is a military duty, because such duty is under the military establishment.

Dig. Op. J. A. G., 67, Par. 12.

It was asserted below by the counsel for the government that our contention was "because these works be-"ing carried out by the officers of the engineer corps "the moneys in contemplation of law must be regarded "as having been 'furnished' or intended for the mili-"tary 'service.'" No such position has ever been assumed by the petitioner. The status of the men distributing the funds has nothing to do with the character of the moneys distributed.

The argument hereinabove concerning the duties of the engineer corps in no sense attempts to deduce the military character of funds for river and harbor work from the *status* of the disbursing officers. The rational deduction is that Congress has always deemed the work military work, and hence the funds are for the military service.

Equally unsound is the position of the counsel for the government, assumed below, that any duty which an army officer is called upon to perform is a military duty; and we do not understand the Runkle case (19 Ct. Cls., 4) to so decide. A soldier is on military duty when he is employed in the military service of the United States. He can be employed to discharge civil functions only when express authority is given by some act of Congress.

Runkle case, *supra*.

Dig. Op. J. A. G., 118, Par. 9.

Whatever may be the duties discharged by the officer, the funds disbursed by him are impressed with their character by the act appropriating them. For example: Formerly the weather bureau was a part of the military establishment and its funds were appropriated under and disbursed as moneys furnished for the military service;

but later the bureau was transferred to the Department of Agriculture, and its funds are appropriated as civil service funds. These funds are devoted to precisely the same purpose and disbursed still by officers of the army. In like manner funds for lighthouses belong to the Treasury Department, and funds for Indians to the Interior; in both cases they may be disbursed by army officers; in neither are they furnished for the "military," but in all for the "civil service."

It was asserted on the part of the government that "the "war department is a part of the civil establishment of "the government." No authority is cited, the statement being the mere *ipse dixit* of counsel. If it be true, not only is Sec. 3623 R. S. U. S. made senseless, but the English language becomes incapable of expressing definite ideas.

4. The letter and spirit of the 60th article of war require that moneys lawfully in the custody of a person in the military service be deemed as "furnished or in-"tended" for that service.

The 60th article of war consists of sections 1 and 2 of the act of March 2, 1863, chapter 67, entitled, "An Act "to prevent and punish frauds upon the government of "the United States."

The act of 1863 applied to all persons "in the military "service."

At the time of the passage of that act, as well as at the time of the adoption of the present articles of war, on June 20, 1874, the corps of engineers had long been recognized as one of the regularly constituted and most important arms of "*the military service*," to the officers of which had been entrusted by law, for years, the

charge of all works of internal improvement carried on by the government, including the improvement of rivers and harbors, in the execution of which many millions of dollars had been expended in the past, and many millions more would be expended in the future.

It is inconceivable that in enacting a statute providing for the punishment of frauds upon the treasury *by persons "in the military service,"* Congress should have entirely overlooked, and in fact, if the decision of Judge Lacombe be correct, intentionally excluded from its provisions all money legally in the custody of officers of the engineer corps of the army for the improvement of rivers and harbors, and should have left the fraudulent misappropriation of such moneys, furnished for and disbursed by officers in the military service in the execution of their regular military duties, to be covered simply by a "catch-all" clause intended to cover offenses against military discipline, inadvertently not otherwise provided for.

The plain and obvious meaning and intention of the statute is to punish persons *in the military service* for defrauding the government *while disbursing funds appropriated for the use of that branch of the public service to which they belong.*

Judge Lacombe drew the conclusion that because the appropriation for the "War Department," containing a further appropriation for Savannah harbor, also contained an appropriation to be expended under direction of the Secretary of War, acting through officers of the army, for the care of the "Smithsonian Grounds," the "laying of asphalt walks around the Judiciary Square, in "the City of Washington," the "lighting of public

"grounds," and the "ordinary care of greenhouses and "nursery at the executive mansion," which latter appropriation the learned judge said surely were not furnished or intended for the military service, neither were the appropriations for river and harbor improvements, because they were of the same class.

It is respectfully submitted that neither the premises nor the conclusions of the learned judge are correct.

In the first place, the improvement of rivers and harbors have relation, not only to the commercial interests of the nation, but also to its naval and military operations.

The navigability of the rivers and harbors is of the greatest importance to its effectual defense, and is as necessary to its safety as are its military posts and fortifications.

In the reports of engineer officers to Congress enumerating, as required by law, reasons why certain rivers or harbors should be improved by the general government, the value of such improvement for the purposes of military or naval operations is given, and is often a largely controlling factor in determining the undertaking of a work of improvement.

See

Act of June 23, 1866, 14 Statutes at Large, 70, 71.

The improvement of the grounds around the City of Washington, on the other hand, has no relation whatsoever to the military operations of the government.

It is, however, respectfully submitted that the learned judge was not warranted in his conclusion that moneys

furnished for the improvement of the grounds around the City of Washington were not moneys "furnished or "intended for the military service," within the meaning of the 60th article of war.

By an act of Congress, the care of those grounds was transferred to the Department of War and placed under the custody and control of a branch of the military service, that is, the engineer corps of the army.

Hence, all moneys appropriated for that purpose, since that transfer, were furnished and intended *for the branch of the service having in charge the execution of the work, viz., the military service*, and a wilful misappropriation by an officer of the army of the moneys received by him in his official capacity would be punishable under the 60th article.

If public moneys for the improvement of rivers and harbors are not for the *military* service, then they must either be for the *naval* or for the *civil* service; *there are no other governmental services*. It will doubtless be conceded that such funds are not for the *naval* service. They must then be for the *civil* service, and must, therefore, be accounted for to the chief of that branch or department of the civil service for which they were furnished or intended, and must be disbursed according to the regulations governing said department. But what department? By express statute they are furnished or intended for the War Department, yet this department comprises *the military service* of the United States, *and none other*.

Colonel Winthrop, the leading American writer on military law, entertains this opinion. Speaking of the special statutory embezzlements defined in sections 5,488,

5,491 and 5,492, R. S. U. S., the author says: "These "acts, though in terms made the subject of trial and pun- "ishment by the United States civil tribunals, are, when "committed by *military* disbursing officers, properly "taken cognizance of by courts-martial under article 60."

Winthrop, Mil. Law (2d Ed.), p. 1097.

To Recapitulate.

(A) The specification was wrongly laid under article 62, because:

(1) The moneys were applied to a purpose prescribed by law.

(2) The alleged embezzlement was not "to the prejudice of good order and military discipline."

(B) The specification should have been laid under article 60, because:

(1) The offense described is covered by paragraph 1 and by paragraph 4 of article 60.

(2) The offense described is covered by paragraph 9 of article 60, since the money was "furnished or intended for the military service."

If I have been at all successful in the foregoing argument, there then remains the question of the legal consequence of laying the specification under the 62d, instead of under the 60th article, where it properly belonged.

The contention of the petitioner is that the action of the court-martial in finding petitioner guily of charge 4 was a nullity, and no sentence could lawfully be imposed under such finding for lack of jurisdiction.

The 62d article of war was intended as a drag-net

wherewith to catch all offenders whose acts could not properly be laid under some other specific article, provided such acts were subversive of military discipline.

2 Winthrop Mil. Law, p. 118 (2nd Ed.).

It is the rule of our military law, knowing no exception, that if any offense can properly be laid under some other specific article, it must not be laid under the general or 62d article.

Commenting on the phrase, "though not mentioned in "the foregoing articles," Winthrop says: "The con- "struction of these words has uniformly been that they "are words of limitation, restricting the application of "the article to offenses not named or included in the ar- "ticles preceding."

2 Winthorp, *loc. cit.*, 1126.

Benet (Military Law, p. 53) uses this language: "When, "therefore, the specified facts and circumstances clearly "point to a particular article, with a distinct penalty at- "tached, the pro ecution must be had under that article, "and the *charge should be expressed in the terms used* "*therein*. (Italics are the author's.)

"Where an offense is clearly defined in a specific ar- "ticle it is irregular and improper to charge it under "another specific article. So, where the article in which "the defense is defined makes it punishable to the ex- "clusion of any other, it is error to charge it under an "article, such as the 62d, which leaves the punishment "to the discretion of the court."

Dig. Op. J. A. G. (Winthrop), p. 146.

The 60th article has attached to it a peculiar penalty not found in any other and prescribed by the 100th ar-

ticle, referred to hereinbefore in a slightly different connection. It is that the offense, if it involve fraud or cowardice, shall be published at the accused officer's home, and thereafter "it shall be scandalous for any officer to "associate with him." This additional punishment, which is a life sentence, is not left to the discretion of the court, but is mandatory under the paragraphs of article 60, under which this specification properly belongs (the 1st, 4th or 9th).

In the opinion of the Circuit Court for the Southern District of New York, in petitioner's first application for a writ of *habeas corpus*, Judge LACOMBE says: "It "would seem to follow that, where an offense is found "to be specifically provided for in any of the articles "prior to the 62d, the grant of jurisdiction to try and "punish such offense is conferred by the particular "article which mentions it, and not by the general lan- "guage of the 62nd article. This proposition has com- "mended itself to text writers (Davis, Mil. Law, pp. "70n–71; Winthrop, Mil. Law (2d Ed.), pp. 1126, "1227), and is in accord with general principles of statu- "tory construction (*U. S.* v. *Tymen*, 11 Wall., 88; *U.* "*S.* v. *Auffmordt*, 122 U. S., 197.)"

In re Carter, 97 Fed. R., 496, 498.

It is true, as a general proposition, that if the court-martial has jurisdiction to try the accused under article 62, it has also jurisdiction to determine whether or not the acts described in the specification or shown in evidence do, as matter of law, constitute a violation of that article, and that its decision on that point cannot be reviewed on *habeas corpus*. But the proposition has this limit, namely, if the facts alleged or the evidence ad-

duced shows a violation of some other specific article, then is the court-martial without jurisdiction to sentence under the 62d article, and, being without jurisdiction, the exercise of the illegal powers may be inquired into collaterally.

Doubtless the decisions in the Swaim case, 165 U. S., 553, in the Fletcher case, 148 U. S., 84, and in the Whitney case, 116 U. S., 178, will be cited as opposed to this view, but it is submitted that, when carefully considered, they in nowise militate against the position here urged.

In the Swaim case the court simply declined to examine the evidence to ascertain whether or not an offense prejudicial to good order and miltary discipline had been shown before the court-martial.

In the Fletcher case the point made was that "the "charges and specifications stated no offense whatever "within any rules and articles of war, or known to the "military law and custom of the United States." This court did, however, examine the charge and specifications sufficiently to be able to say, and did say, that the circumstances detailed in the specifications "were such "as to render the claimant amenable to the charge" of conduct unbecoming an officer and a gentleman for which he was tried.

There is no case, so far as the writer's researches have extended, holding that the court on *habeas corpus* will not inquire if the specification (or the evidence, if the evidence be before it) make out a case cognizable under some particular article and not under the general article under which such specifications is laid.

It is this point which sharply distinguishes the case at

bar from the cases last above cited. In none of them was the question presented that the allegations or the evidence made out a case cognizable under some specific article, and hence not triable under the 62nd or general article.

If the contention on the part of the Government, that the funds alleged to have been embezzled in charge 4 and its specifications were not "furnished or intended for the "military service," be true, then it follows that the court-martial was wholly without jurisdiction to try and sentence under that charge, for the offense was purely civil.

The offense charged was alleged to have been committed by an engineer officer doing duty on rivers and harbor work not connected with any military post or command, not in the presence of soldiers, performing a purely civil duty. The subject of embezzlement as contended by respondent was funds not for "the military "service." If this be the real nature of the funds, then it would be hard to imagine anything less calculated to prejudice military discipline than to embezzle such money within the meaning of Sec. 5,488.

If larceny by a soldier from a civilian, at a place away from a military post, the soldier not being in uniform, be a *civil* and not *military* offense, and, therefore, not triable by court-martial, as is conceded by the Manual, p. 16, then the statutory embezzlement, as charged in this case, of funds not intended for the military service, under the given circumstances, is civil and not a military offense; except only if it constitute conduct unbecoming an officer and a gentleman, under article 61.

The government is thus on the horns of a dilemma.

First: If its contention be sound that the duty to be performed came under the civil service branch of the government, and the moneys appropriated were for *that* branch of the service, then the misconduct alleged could in no way be to the prejudice of good order and *military discipline*, and hence not chargeable under the 62d article.

Second: If the offense be "to the prejudice of good order and *military discipline*," then it necessarily follows that the accused was performing a duty under "the military service" branch of the government, and the moneys appropriated and disbursed in the performance of such duty were for that branch of the service, and hence directly within the specific provisions of the 60th article.

If the first proposition be correct, the conclusion necessarily follows that offenses committed by officers in charge of river and harbor improvements in connection with those works are not triable or punishable under the articles of war at all, but under the civil statutes providing for the punishment of frauds against the treasury. In which case the court-martial would be entirely without jurisdiction of the offense of which the accused has been found guilty.

The jurisdiction of courts-martial is confined to the punishment of *military persons* for strictly *military offenses*. Nor can Congress confer jurisdiction upon courts-martial for the trial of *civil offenses*.

The decision in *Ex Parte Henderson* (11 Fed. Cases, 1067) was made under the act of March 2, 1863, and it was held that in so far as the act sought to make a contractor for the furnishing of military supplies to the army amenable to the jurisdiction of a court-martial it was unconstitutional and absolutely void.

What was said by the learned judge as to the jurisdiction of courts-martial is directly applicable here, and justifies a quotation at length from the opinion:

"As, then, the power of Congress is limited to mak-
"ing rules and regulations for the government of the
"land and naval forces, and of the militia in service, it
"would seem to follow that these regulations cannot ex-
"tend beyond what is necessary and proper for the gov-
"erning of these forces as such, *and in their military*
"*character*. It is doubtful whether they can be sub-
"jected to trial by court-martial for anything *except*
"*breaches of military duty*. Every soldier may be or
"is a citizen, and, it would seem, *is as much entitled to*
"*a trial by jury for any alleged crime not committed by*
"*him in violation of his duty* AS A SOLDIER *as any other*
"*person*.

"It would be difficult to maintain that a law which
"subjected to trial by court-martial for such an offense
"could be properly derived from the authority to pro-
"vide for governing the land forces, or would have any
"constitutional sanction. I find, indeed, that no law
"subjecting *a soldier* to such trial *for such an offense*,
"committed in time of peace, has ever been enacted in
"either England or America, unless the act we are now
"considering be an exception.

"The mutiny act of England and our articles of war
"are confined to the defining and the providing *for the*
"*punishment of military offenses*. The purposes of these
"acts are so clearly and so accurately stated by Lord
"Loughborough in the case of *Grant* v. *Gould*, 2 H.
"B. L., 99, that I cannot forbear quoting from his
"opinion:

"'The army being established by the authority of the
"legislature, it is an indispensable requisite of that es-

" tablishment that there should be order and discipline " kept up in it, and that the persons who compose the " army, *for all offenses in their military* capacity, should " be subjected to a trial by their officers. That has in- " duced the absolute necessity of a mutiny act accom- " panying the army. * * * The object of the mu- " tiny act, therefore, is to create a court vested with " authority to try those who are *in the army*, in all their " different description of officers and soldiers, and the " object of the law *is limited to breaches of military duty.* " Even by that extensive power granted by the legislat- " ure to his majesty to make articles of war, those " articles are to be for the better government of his " forces, *and can extend no further than they are thought* " *necessary to the regularity and due discipline of the* " *army.*

" 'When war is actually raging it is said that a muti- " neer or deserter might unquestionably be tried by a " military tribunal, according to the customary law of " war. And perhaps at that time other offenses com- " mitted by anyone in the camp and in the field may be " punished under the same law by the commander; but " the common law of England knew nothing of courts- " martial, and made no distinction in time of peace be " tween a soldier and any other subject. * * * The " English people, with their omnipotent parliament, have " ever been exceedingly jealous of granting to courts- " martial any jurisdiction over persons except those act- " ually in their army or navy. *And over them they have* " *granted jurisdiction to punish only military offenses*— " SUCH JURISDICTION ONLY AS SEEMED ESSENTIAL FOR " THEIR GOVERNMENT AS SOLDIERS OR SAILORS.' "

Ex parte Henderson, 11 Federal Cases, 1076, 1077.

The highest law office of the United States, the attorney-general, seems to entertain this view; for he has caused this petitioner and the contractors under the contracts of 1896 to be indicted in the Federal court at Savannah, Georgia, for the same offense as charged against petitioner in the court-martial proceedings. This fact is set out in this application for *habeas corpus*, and a copy of the indictment attached.

And, it is submitted that this is the proper position to take. For why are not the courts of the United States, presided over by judges learned in the law—incapable, as every lawyer who has practiced before them knows, of being swayed by prejudice—able to guide a jury of the defendant's peers to a conclusion on the facts consistent with justice, the proper tribunals for such cases? Why should not this petitioner have been accorded in the first instance that inestimable privilege of American citizens, a jury trial in such a court?

If his alleged offense be more heinous than that of the contractors because of his fiduciary capacity, it differs only in degree, not in kind, from theirs. If found guilty, a Federal judge, in his sentence, could well apportion the punishment.

As aptly said by the learned judge in the Henderson case, *supra*:

"If others may assert, I cannot, that in the civil courts "justice will not be done between the government and "the accused. If others may assert, I cannot, that courts-"martial are by their organization and mode or pro-"ceeding better fitted to administer enlightened justice "than civil courts, presided over by judges learned in "the law and aided by impartial juries; and if anyone

"assert that the law is more promptly vindicated in the "courts-martial than in civil courts, LET HIM ALSO BE "SURE THAT IT IS NOT MORE ABUSED."

Ex parte Henderson, 11 Fed. Cas., 1067, 1078.

The argument *ab inconvenienti* is not without force in this connection. It is alleged in the petition, and not traversed, that petitioner has been indicted by a Federal grand jury for the same offense set out under charge I. As the authorities now stand he cannot plead *autrefois convict*, when he shall be arraigned in the United States District Court in Georgia.

Re Esmond, 5 Mackey, 64.
U. S. v. *Cashiel*, 1 Hughes, 552.
Howe's Case, 6 Op. Atty. Genl., 506.
U. S. v. *Maney*, 61 Fed. Rep., 140.

The case last cited well illustrates the dangerous situation of petitioner.

Maney was tried before the United States Circuit Court for the Northern District of Illinois, which court, under the statute ceding jurisdiction over the Ft. Sheridan reservation by Illinois to the United States, had jurisdiction of the offense, for the murder of one Hedburg, a captain in the 15th U. S. Infantry. He was acquitted.

He was then charged with the felonious killing of the same person and tried before a general court-martial at Ft. Snelling. He pleaded former acquittal, and the plea was overruled. He then applied for a writ of prohibition in the United States Circuit Court at St. Paul; but the application was denied Maney, and the trial proceeded before the court-martial. Fortunately for him, he was

again acquitted. In the court-martial case there was no question raised as to the offense being purely military, and therefore different from the offense for which he was tried by the United States Circuit Court. It was not pretended that Hedburg was the superior officer in the meaning of the article of war (Art. 21) denouncing a penalty for striking a superior officer, nor was there any pretense of mutiny or the like.

It was a question simply of an affray between two soldiers, both amenable primarily to the jurisdiction of military tribunals, in which one killed the other in necessary self-defense.

Such a situation is abhorrent to the mind of the American lawyer; it is contrary to the genius of our institutions; and if such a principle has crept into our Anglo-Saxon jurisdiction, it is high time it should be scourged out of our temples of justice.

Loan Association v. *Topeka*, 20 Wall., 655.

I am well aware that this so-called "double amenability" theory is a favorite with military text-writers. It is supposed to find its analogy in the dual responsibility of the citizen to his state and to the United States (*Fox* v. *Ohio*, 5 How., 410; *Moore* v. *People*, 14 How., 13), than which nothing could be more far-fetched. It is not difficult to conceive that a criminal, by a single act, may offend the sovereignty of the United States and of a particular state; but how he can, by such act, doubly offend the sovereignty of either alone, in a like degree, is not nearly so clear. In the case of Maney, above cited, it was solemnly adjudicated as between him and the United States, by a court having full jurisdiction, that the fatal blow was struck in self-defense. As between the parties,

that fact became *res adjudicata*, not to be re-litigated in another court of the United States.

The question first arose in Steiner's case, 6 Op. Atty. Genl., 413, in which the alleged offense was in violation of the laws of Texas. Steiner was acquitted in the Texas State court, but was afterwards (properly enough) tried by court-martial for the same offense. The principle was unwarrantedly (as I believe) extended in Captain Howe's case; he having been, as Maney was, acquitted by the United States Court in Florida. Since then, on the assumed parallelism, the rule has been invoked in the cases in the United States courts, *supra*.

The rule of offenses against different sovereignties did not establish itself easily. In the Fox case, *supra*, Mr. Justice McLean vigorously dissented, and stated in his opinion that, in consultation before his death, Mr. Justice Story agreed with him. In the case of the Slave Amy (14 Md., 149), Mr. Chief Justice Taney, while conceding the rule in the Fox and More cases, said:

"Yet in all civilized countries it is recognized as a "fundamental principle of justice that a man ought not to "be punished twice for the same offense. And if this "party had been punished for the larceny by the state tri- "bunal, this court would have felt it to be its duty to "suspend sentence"—a principle so reluctantly admitted certainly ought not be unduly enlarged.

In McArthur on Military Law (Vol. 2, p. 300) it is said: "But it does not thence follow that every officer tried "and who may be acquitted or convicted before a civil "court of judicature is liable in all cases to be tried a "second time by a court-martial for the same offense. It "is only under peculiar circumstances of the offense be-

"ing attended with scandalous actions, or conduct de-
"rogatory to the military profession, that would render
"him liable to be tried for the same offense, even after
"acquittal or conviction by the civil court."

It is perhaps worthy of remark that the attorney-general, Cushing, based his conclusion in Steiner's case largely on McArthur, and quotes from him at length, stopping his extract, however, just before the beginning of the paragraph above set out.

McArthur suggests the true principle. If, in the given act, there is some quality which, while indifferent in the eye of the municipal law, does yet peculiarly offend some principle of the law military, then for that peculiar element—that overplus of offense, as it were—the soldier should be punished by the court-martial. To apply the principle to the present case: The alleged offense of Carter, so far as it was a fraud upon the government, was no worse, no other in kind or degree, than if any civilian disbursing officer, as, *e. g.*, an assistant treasurer of the United States, had committed a like fraud. There is, therefore, no more reason why the one should be tried by a court-martial, for the fraud *per se*, than the other. There is every reason why both should be tried in a civil court of the United States before a jury and a judge learned in the law.

But such a fraud by an army officer would certainly offend the military code at it most sensitive part. It would be conduct unbecoming an officer and a gentleman, in violation of the 61st article of war—a crime for the trial of which a court-martial is as peculiarly fit as it is peculiarly unfit to try a complicated case of fraud or conspiracy.

The logical result of all this is, I submit, that Carter should have been tried by the court-martial for a violation of Art. 61, and by the United States District Court at Savannah for the rest.

That the matter does work out so logically is surely a strong argument that the court-martial exceeded its jurisdiction it trying petitioner for the purely civil offense described in charge 4 and its specification; that so many and such serious objections can be urged against the other theory is equally an argument against its truth.

II.

THE SENTENCE IS IN VIOLATION OF THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

Assuming that it has been demonstrated that the specification under article of war 62 was wrongly laid thereunder; and that to convict and sentence under charge 4 was beyond the powers of the court-martial, it is now insisted that by the sentence of fine, imprisonment, dismissal and degradation, Captain Carter has been more than once put in jeopardy for the same offense.

That this court in *habeas corpus* will look into the evidence when properly brought before it, to determine the identity of the offense for which petitioner claims he is being twice punished, is settled by the case of *Nielson*, 131 U. S., 176. By a parity of reasoning this court, in such proceeding, will scrutinize the pleadings to determine such alleged identity.

In the application for the writ in this case it is alleged: "That it appears from the charges and specifications "upon which said Carter was tried by said court-martial,

"and it also appears from the evidence delivered before "said court-martial, that the payment of the two checks "drawn by said Carter and described in each of the "specifications under which he was convicted are the "only basis of each of said four charges, and that the "single act of drawing said two checks has been carved "up into four distinct and different crimes and a punish- "ment assessed on each."

This allegation is not traversed by the return.

Two things must concur before the plea of twice in jeopardy can be availed of in this case.

First, that the sentence is greater than the court-martial had jurisdiction to inflict on any one of the offenses charged, taken singly; and

Second, that the offenses charged are the same, within the meaning of the constitutional provision

The first may shortly be disposed of.

The punishment must be imposed under the provisions of either the 60th or the 61st article of war or under both. Under the 61st the only penalty that can be inflicted is dismissal; under the 60th the punishment may be "fine *or* imprisonment *or* such other punishment as a "court-martial may adjudge."

That the punishment allowable under Art 60 is in the alternative and not cumulative is emphasized by the course of legislation in respect to that article.

The 60th article of war consists of sections 1 and 2 of the act of March 2, 1863, chapter 67, entitled "An "Act to prevent and punish fraud upon the government "of the United States."

By reference to that legislation we find it originally

provided that any person in the military service, if found guilty, "shall be punished by fine AND imprisonment OR "such other punishment as the court-martial may ad- "adjudge, save the punishment of death."

A person in civil life guilty of the offense, it was provided, should be punished "by imprisonment not less "than one nor more than five years OR by fine of not "less than $1,000 and not more than $5,000."

See

Act of March 2, 1863.
12 Statute at Large, pages 696–698.

By the legislation, as originally enacted, a soldier might be punished by fine AND imprisonment OR such other punishment might be adjudged, while a civilian could only be punished by fine OR imprisonment.

When the military offense was transferred to the military code the punishment was changed to conform more nearly to that allowed for a civilian. The word "AND" was stricken out and the word "OR" inserted, clearly showing the intention of Congress to confine the punishment of a soldier to fine OR imprisonment, as in the case of a civilian.

Under a precisely similar statute the Supreme Court ruled that it was error to inflict the cumulative punishment, and that the error could be reached by *habeas corpus* proceedings.

Ex parte Lange, 85 U. S., 163.

In that case the prisoner was charged with stealing and embezzling and appropriating to his own use certain mail boxes belonging to the postoffice department. Upon a trial he was found guilty of appropriating to his own use

mail boxes of the value of less than $25, the punishment of which, as provided by statute, was imprisonment for not more than one year OR a fine of not less than $10 nor more than $200

The presiding judge sentenced the prisoner to one year's imprisonment AND to pay $200 fine. The fine was paid and the prisoner was committed to jail in execution of the sentence. A *habeas corpus* writ was sued out to discharge him on the ground that the sentence was illegal, the statute authorizing only one of the punishments, and not both.

The point was held to be well taken and the prisoner was discharged.

Second. The indentity of the offenses charged.

Charge 1: Conspiracy in violation of the 60th article of war.

Specification: That the accused, a disbursing officer, did conspire, with others named, to obtain the allowance and payment of certain false and fraudulent claims against the United States, and pursuant to such conspiracy, among other things mentioned, accepted inferior materials to those specified by two contracts dated October 8, 1896, and caused to be paid out on account of such materials, $230,749.90 and $345,000, money of the United States.

Charge 2: Causing false and fraudulent claims to be paid in violation of the 60th article of war.

Specification: That the accused, a disbursing officer, did knowingly accept materials inferior to those specified in the two contracts of October 8, 1896, and did cause to be paid therefor the sums $230,749.90 and $345,000, money of the United States.

Charge 3: Conduct unbecoming an officer and a gentleman, in violation of the 61st article of war.

Specification: That the accused, a disbursing officer, did knowingly on certain false accounts, the money not being due, cause to be paid the sums of $230,749.90 and, $345,000, money of the United States.

The identity of the two checks drawn for the sums of $230,749.90 and $345,000 respectively is admitted by the pleadings.

It may be conceded that the same act may constitute two distinct offenses against the same sovereignty; or, as Judge Wallace said in his opinion in the former application for the writ of *habeas corpus* by this petitioner (*Rose* v. *Roberts*, 99 Fed. R., 948), the legislature may carve more than one offense out of a single criminal transaction; but surely, as the object of the state in punishing crime in modern times is not the wreaking of vengeance but to protect society and to reform the criminal, so the construction should not be strained to create two offenses out of a single act.

As far back as Montesquieu it was said that in "moderate governments" "a good legislator is less bent upon "punishment than preventing crimes."

Montes. Spirit of Laws, Book 4, Ch. 9.

As this is the rule in all modern ethics (see 2 Lieber, Political Ethics, Bk. 7, Ch. 2, Sec. 8), so it is the principle of enlightened jurisprudence.

In *State* v. *Cooper*, 13 N. J. Law, 361, 375, it is said:

"If in civil cases the law abhors a multiplicity of "suits, it is yet more watchful in criminal cases that the

"King shall not oppress the subject or the government "the citizen by unnecessary prosecution." This case, cited below, was on this very subject of twice in jeopardy.

"While the legislature may pronounce as many com- "binations of things as it pleases as criminal, resulting "not infrequently in a plurality of crimes in one trans- "action, or even in one act, for any of which there may "be a conviction without regard to the others, it is in "the language of COCKBURN, C. J., 'a fundamental "rule of law that out of the same facts a series of "charges shall not be preferred.'"

1 Bish. New Crim. Law, Par. 1060.
Reg. v. *Elrington*, 9 Cox. C. C., 86, 90.

Bishop, in his New Criminal Law, paragraph 1,051, suggests the following tests: "The offenses are not the "same when (1) the two indictments are so diverse as to "preclude the same evidence from maintaining both; or "when (2) the evidence to the first and that to the sec- "ond relate to different transactions; or when (3) each "indictment sets out an offense differing in all the ele- "ments from that in the other, though both relate to one "transaction—a proposition of which the exact limits "are difficult to define; or when (4) some technical vari- "ance precludes a conviction on the first indictment but "does not appear on the second.

"On the other hand (5) the offenses are the same "whenever evidence adequate to the one indictment will "equally sustain the other. Moreover, (6) if the two "indictments set out like offenses and relate to one trans- "action, yet if one contains more of criminal charge "than the other, but upon either there would be a con- "viction for what is embraced in the other, the offenses,

"though of different names, are, within our constitu-
"tional guarantee, the same."

Illustrative of No. 6 in Dr. Bishop's suggestion the following cases are cited:

In *Fox* v. *State*, 50 Ark., 528, Fox was indicted for robbing one Everidge, and was acquitted. He was then indicted for the false imprisonment of Everidge, pleaded former acquittal, alleging that the two cases were the same transaction. The court sustained a demurrer to the plea and the defendant was convicted.

The court say, by Cockrill, C. J.: "Now, an assault "is an essential ingredient in every robbery, and per-"haps in every offense of false imprisonment. False "imprisonment is classified as a species of aggravated "assault, and the circumstances of the offense charged in "this case would certainly assign it to that classification. "Under the indictment for robbery he might have been "convicted of a simple assault. * * * A verdict of "'not guilty' on the trial under the indictment for rob-"bery was an acquittal of all minor offenses charged in "the indictment; it was therefore an acquittal of the "simple assault. * * * The limitation upon the "doctrine announced by Mr. Bishop, which is made "by the case last cited, as explained in *Southworth* v. *State*, "42 Ark., 270, is that a conviction of a misdemeanor be-"fore a justice of the peace, punishable by fine only, is no "bar to a prosecution for a grade of the offense amounting "to a felony, of which the justice had no jurisdiction. "* * * The qualification does not affect this case. If "it is true, as admitted by the demurrer, that Fox was "acquitted in the Circuit Court on a former trial of the "essential ingredients of the offense now charged against "him, this prosecution cannot proceed."

In *State* v. *Cooper*, 13 N. J. Law, 361, it is said: If a man break into the house of A in the night time and steal his goods, and upon an indictment for burglarly and stealing those goods he be acquitted, it would bar a subsequent prosecution for the larceny. So, if he be indicted for the simple larceny and acquitted he cannot afterwards be convicted on an indictment for the burglary and larceny.

The court quote with approval the following passage from 1 Chitty's Crim. Law, 455: "It is not in all cases "necesary that the two charges should be precisely the same "in point of degree, for it is sufficient *if an acquittal of "the one would show that the defendant could not have "been guilty of the other.* Thus, a general acquittal of "murder is a discharge upon an indictment for man-"slaughter upon the same person, because the latter "charge was included in the former, and if it had so ap-"peared on the trial the defendant might have been con-"victed of the inferior offense; and on the other hand an "acquittal of manslaughter will preclude a future prose-"cution for murder; for, if he were innocent of the mod-"ified crime, he could not be guilty of the same fact, "with the addition of malice and design."

The other test of identity proposed by Dr. Bishop, No. 5 in the paragraph above cited, is the test to be here invoked. The following cases are cited as illustrations of how different courts have ruled on the matter:

In *United States* v. *Lea*, Fed. Cases 15,586 (4 Cranch's C. C., 486), it was held that a conviction for the offense of stealing a pocket book was a bar to a subsequent prosecution for the theft of a note which was contained in the pocket book when the latter was stolen.

In *United States* v. *Miner*, Fed. Cases 15,780 (11 Blatch., 511), it was held that an acquittal on a charge of having in possession a counterfeiting plate is a bar to prosecution for having another plate in possession at the same time—when the two plates were so connected together as that the possession of one necessarily implied the possession of the other.

In *Holt* v. *State*, 38 Ga., 187, plaintiff in error, with others, had been indicted for assault to murder committed upon one Ralston, and they were acquitted. At a later term of court another indictment was found charging plaintiff and the same persons with aggravated riot, specifying an assault with a loaded pistol upon said Ralston. They pleaded former indictment and acquittal. The state demurred, demurrer being overruled.

In the opinion of the court Warner, J., says: "If the "defendants have been legally acquitted for the same "*criminal acts* in the first indictment, though a differ- "ent name is given to the offense in the second indict- "ment, it is exceedingly difficult to conceive upon "what principle they *can be* twice tried for the same "criminal acts though *technically* it may not be for the "same offense in name. Can a state put a party upon a "trial the second time for the same *criminal act* after he "has been *acquitted* by changing the *name* of the accu- "sation? If it can, then his constitutional protection "does not amount to much. The effort here is to *evade* "the provision of the constitution by changing the name "of the *offense*." Judgment reversed.

In *State* v. *Cameron*, 50 Tenn., 78, the acquittal of a state official on an indictment charging embezzlement by falsely pretending that public money was stolen from

him during his incumbency is a bar to a subsequent prosecution for failure to turn over the same money at the expiration of his office.

In *State* v. *James*, 63 Mo., 570, defendant was indicted in two counts; one for putting "scrip" in circulation, the other for putting "notes" in circulation. The maximum punishment for either offense was $5,000 fine. The jury found a verdict of guilty as to each count, and assessed the punishment at a fine of $5,000 on each. *Held*, that as both counts referred to the same transaction, the punishment was double; and the case was reversed.

In *Wright* v. *State*, 17 Tex. App., 152, the defendant below was indicted for the theft of fifteen head of cattle belonging to one Floyd. He had been acquitted of the theft of cattle belonging to one Houston. It was insisted that both thefts were one and the same transaction, and that the plea of former acquittal should have been sustained.

The court draws a distinction between the legal results of a plea of former acquittal and one of former conviction, and then proceeds:

"But suppose the defendant had been convicted in the "first case for the theft of Houston's cattle, then on the "second for the theft of Floyd's cattle, he could plead "the former conviction, and if the evidence showed that "the transaction was but a single one, that is, that "the cattle of Houston and Floyd were taken at the "same time and place, his plea would be good and should "prevail, because the transaction being but one, the "prosecution could carve but once, and being once "carved and convicted, it could not claim another and

"second conviction against the same party for the sec-
"ond offense. In *Wilson* v. *State*, 45 Tex., 76, it was
"held that 'the stealing of different articles of property
"belonging to different persons at the same time and
"place so that the transaction is the same is but one
"offense against the state, the man cannot be con-
"victed on separate indictments charging different
"parts of one transaction as in each a distinct offense. A
"conviction on one of the indictments bars a prosecu-
"tion on the others.' "

This court has passed on the same subject in several cases, and in so exhaustive a manner as to make the preceding citations perhaps unnecessary, were it not for the importance of the principle involved, and this importance will, it is hoped, excuse somewhat lengthy quotations from the opinions of the learned justices in the cases now to be cited.

In *Ex parte Nielson*, 131 U. S., 176, petitioner had been indicted, convicted and sentenced under the Edmunds act for unlawful cohabitation. He was also indicted for adultery, the offense being laid on a date prior to the first indictment. Mr. Justice Bradley, with his usual perspicuity and force, said, in part, as follows:

"Now, the petitioner, in his plea, averred in terms
"that the unlawful cohabitation with which he was
"charged in the first indictment continued without inter-
"mission up to the time of finding that indictment, cov-
"ering the time within which the adultery was laid in
"the second indictment. He also averred that the two
"indictments were found against him upon the testimony
"of the same witness, on one oath and one examination,
"as to the alleged offense, covering the entire time speci-
"fied in both indictments. This plea was demurred to

"by the prosecution and the demurrer was sustained. "The averments of the plea, therefore, must be taken "as true. And assuming them to be true, can it be "doubted that the adultery charged in the second indict- "ment was an incident and part of the unlawful cohabita- "tion? We have no doubt of it. True, in case of "Snow, we held that it was not necessary to prove sex- "ual intercourse when making out a case of unlawful "cohabitation; that living together as man and wife was "sufficient; but this was only because proof of sexual "intercourse would have been merely cumulative evi- "dence of the fact. Living together as man and wife "is what we decided was meant by unlawful cohabitation "under statute. Of course, that includes sexual inter- "course, and this was an integral part of the adultery "charged in the second indictment, and was covered by "and included in the first indictment and conviction. "The case was the same as if the first indictment had in "terms laid the unlawful cohabitation for the whole "period preceding the finding of the indictment. The "convictionon that indictment was in law a conviction of "a crime which was continuous, extending for the whole "period, including the time when the adultery was al- "leged to have been committed. The petitioner was "sentenced and the punishment he underwent on the first "indictment was for that entire continuous crime. It "included the adultery charged. To convict and punish "him for that also was a second conviction and punish- "ment for the same offense. Whether an acquittal "would have had the same effect to bar the second in- "dictment is another question on which we express no "opinion. We are satisfied that a conviction was a "good bar, and that the court was wrong in overruling

"it. We think so because the material part of the adul-
"tery charged was comprised within the unlawful co-
"habitation of which the prisoner was already convicted,
"and for which he had suffered punishment. * * *
"Thus, in the case of *State* v. *Cooper* (13 N. J. Law,
"361), where the defendant was first indicted and con-
"victed of arson, and was afterwards indicted for the
"murder of a man burnt and killed in the fire produced
"by the arson, the Supreme Court of New Jersey
"held that the conviction of the arson was a bar to the
"indictment for murder, which was the result of the
"arson. So in *State* v. *Nutt* (28 Vermont, 598), where
"a person was covicted of being a common seller of
"liquor, it was held that he could not afterwards be
"prosecuted for a single act of selling within the same
"period. 'If,' said the court, 'the government see fit
"to go for the offense of being a common seller, and the
"respondent is adjudged guilty, it must, in a certain
"sense, be considered as a merger of all the distinct acts
"of sale up to the filing of the complaint, and the re-
"spondent can be punished but for one offense.' * * *
"The books are full of cases that bear more or less upon
"the subject we are discussing. As our object is simply
"to decide the case before us, and not to write a general
"treatise, we content ourselves, in addition to what has
"already been said, with simply announcing our conclus-
"ion, which is, that the conviction of the petitioner of
"the crime of unlawful cohabitation was a bar to his sub-
"sequent prosecution for the crime of adultery; that the
"court was without authority to give judgment and
"sentence in the latter case, and should have vacated and
"set aside the same when the petitioner applied for a

"*habeas corpus;* and that the writ should have been "granted and the petitioner discharged."

See, also,

Ex parte Snow, 120 U. S., 274.

In *U. S.* v. *Chouteau*, 102 U. S., 603, the question was whether sureties on a distiller's bond could be subjected to the penalties attached to the commission of an offense when the principal had compromised with the government for prosecution based on the same offense, designed to secure the same penalty. Mr. Justice FIELD, speaking for the court, said: "Under the authority of "an act of Congress a compromise with the government "was effected, by which a specific sum was paid by him "and received by the government 'in full satisfaction, "compromise and settlement of said indictments and "prosecutions,' which were accordingly dismissed and "abandoned. That compromise necessarily covered the "causes or grounds of the prosecution, and consequently "released the party from liability for the offenses charged "and any further punishment for them. The answer "avers that the removals of distilled spirits set forth in "the assignment of breaches of the condition of the "bond are the same removals recited in the indictments, "and that all the evidence necessary to establish the "breaches assigned would have been necessary and com-"petent under the indictment. The two proceedings, "the civil action and the criminal prosecution, so far as "they relate to offenses under section 3296, are based "upon the same transaction. * * * Admitting that "the penalty may be recovered in a civil action, as well "as by a criminal prosecution, it is still as a punishment "for the infraction of the law. The term penalty in-

"volves the idea of punishment, and its character is not "changed by the mode in which it is inflicted, whether "by a civil action or a criminal prosecution.

"The compromise pleaded must operate for the protec- "tion of the distiller against subsequent proceedings as "fully as a former conviction or acquittal. He has been "punished in the amount paid upon the settlement for "the offense with which he was charged, and that should "end the present action, according to the principle on "which a former acquittal or conviction may be invoked "to protect against a second punishment for the same "offense. To hold otherwise would be to sacrifice a great "principle to the mere form of procedure and to render "settlements with the government delusive and useless."

In *Coffey* v. *U. S.*, 116 U. S., 436, Mr. Justice BLATCHFORD referring to the case of *U. S.* v. *McKee* (4 Dill., 128), said:

"In a case before Judge Dillon (*U. S.* v. *McKee*, 4 "Dil., 128), the defendant had been convicted and pun- "ished under a section of the Revised Statutes for con- "spiring with certain distillers to defraud the United "States by unlawfully removing distilled spirits without "payment of the taxes thereon. He was afterwards "sued in a civil action to recover a penalty of double "the amount of the taxes lost by the conspiracy and "fraud. The two alleged transactions were but one, and "it was held that the suit for the penalty was barred by "the judgment of the criminal case. The decision "was put on the ground that the defendant could not be "twice punished for the same crime, and that the former "conviction and judgment were a bar to the suit for the "penalty."

It remains to apply these principles to the case at bar.

Let it be conceded for the present that the first charge and specification charge a conspiracy, which is a distinct offense from the completed fraud alleged under charges 2 and 3 and their specifications, and examine now only these latter.

The *gravamen* of the offense charged in each count is the payment by the disbursing officer of the two sums mentioned, knowing them to be based on false accounts. It is true that in charge 2 it is alleged that the falsity in the accounts was the inferiority of the materials accepted, while in charge 3 it is alleged simply that the money was not due, and hence the averments "due" and "owing" relate to the *amounts* due and not to the *time* of maturity; and the sums were not due because, by reason of the inferiority of the materials accepted, the contractors had not earned so much money as was represented by the checks in question, they being admittedly the same checks in both specifications. To paraphrase the language of Mr. Justice Bradley in the Nielson case, the material part of the fraud charged, the acceptance of inferior material, was comprised within the general allegation that the money was not due.

Or to put the matter in another way:

The gist of the offense is the payment of the two checks when they were known not to be due or owing. Let it be supposed that for a number of different reasons, represented by the symbols a, b, c, d, e, etc., they were not due. Now, will it be contended that the government could indict and punish a defendant for causing the false claims for $230,749.90 and $345,000 to be paid, alleging that they were fradulent, for the reason "a"; and thereafter again punish for causing the same two sums to be paid, alleging they were fraudulent for the

reason "b"; and thereafter for the reason "c"; and again for "d"; and so on indefinitely as long as the various reasons held out? Making the concrete application to the case at bar, it is alleged in the first specification that a conspiracy was entered into to cause a false claim to be paid by the United States to certain favored contractors. The successive steps are set out as overt acts, namely: So advertise for proposals as to favor the co-conspirators; so manage the advertising; so give out information; so receive proposals; so award the contracts, as in each case to favor such co-conspirators; then afterwards accept inferior materials from them; and finally pay the full sum specified in the contracts for such inferior materials. Now, would it be competent for the prosecution to so split up the charges as to allege in different counts each one of the foregoing reasons as making the final payments fraudulent and demand for each a separate punishment? Yet this is precisely the effect attained in the case at bar.

Treating charge 1 as a distinct offense, a sentence of fine or imprisonment or some other punishment could be imposed under article 60.

For charge 2 a fine or imprisonment or some other punishment (dismissal) was imposed by the court-martial. This exhausted its powers of punishment. But for precisely the same offense, called by a different name under charge 3, an additional punishment was inflicted, in violation of the constitution. It is immaterial how we distribute the component parts of the sentence (assuming that under the law this court may distribute); the fact remains that but two offenses were committed and three different punishments inflicted, and this under a statute which allows of but one punishment for one offense.

Two of those component parts have been suffered by petitioner, namely: dismissal and fine. The third, imprisonment, is forbidden by law; and he is, therefore, now illegally restrained of his liberty.

There is yet another aspect of this sentence. If the court was without jurisdiction to sentence under Charge IV, as I have hereinabove shown, then is the penitentiary portion of the sentence utterly void, because of the addition of the phrase "hard labor." The 60th Article provides only for imprisonment, which means at some military garrison and not at any penitentiary. The Pridgeon case (153 U. S., 48) is, therefore, not in point.

III.

THE ENTIRE SENTENCE IS ILLEGAL AND VOID BECAUSE THE PRESIDENT, HAVING DISAPPROVED THE FINDING OF CONVICTION BY THE COURT-MARTIAL AS TO CERTAIN OFFENSES, FOR THAT THERE WAS A FAILURE OF PROOF AS TO THEM, AND HAVING ORDERED THE ORIGINAL SENTENCE TO STAND, SUCH SENTENCE CEASED TO BE THE SENTENCE OF THE COURT-MARTIAL.

The court-martial found specifically a verdict of guilty as to each of the following charges and specifications:

Charge 1.

"Of the 2d specification, 'Guilty,' except the words, "'and other material,' and interpolating the word 'and' "between the words 'mattresses' and 'stone,' wherever "those words occur in the specification, of the excepted "words 'not guilty' and of the interpolated words, "'guilty.'"

"Of the charge, 'Guilty.'"

Charge 2.

"Of the 6th specification, 'Guilty,' except of the "words, 'and other material,' where they occur the sec- "ond and third time, and interpolating the word 'and' "between the words 'mattresses' and 'stone' where "they occur the second and third time; of the excepted "words, 'not guilty;' of the interpolated word, 'guilty.'

"Of the 7th specification, 'Guilty.'

"Of the 8th specification, 'Guilty.'

"Of the 9th specification, 'Guilty.'

"Of the 10th specification, 'Guilty.'

"Of the charge, 'Guilty.'

Charge 3.

"Of the 2d specification, 'Guilty.'

"Of the 3d specification, 'Guilty.'

"Of the 4th specification, 'Guilty.'

"Of the 5th specification, 'Guilty,' except of the words "'the articles have been' and of the excepted words "'not guilty.'

"Of the 6th specification, 'Guilty.'

"Of the 7th specification, 'Guilty.'

"Of the 9th specification, 'Guilty.'

"Of the 11th specification, 'Guilty.'

"Of the 22d specification, 'Guilty.'

"Of the charge, 'Guilty.'

Charge 4.

"Of the 1st specification, 'Guilty.'

"Of the charge, 'Guilty.'"

Making sixteen specifications under four charges.

These specifications embraced the following alleged offenses:

1. Knowingly making and causing to be paid a fraudulent pay roll for $29.50.

2. Knowingly causing to be paid a certain fraudulent voucher for $121.60 for certain guide piling, on January 12, 1897.

3. Knowingly causing to be paid a certain fraudulent voucher for $384 for guide piling, on March 10, 1897.

4. Knowingly causing to be paid a certain other fraudulent voucher for $108.80 for guide piling, on July 19, 1897.

5. Knowingly making a false statement to the chief of engineers with respect to certain new soundings in Savannah Harbor.

6. Knowingly making a false statement to the chief of engineers as to certain alleged excessive claims for damages by riparian owners on Savannah river.

7. Converting $132.10 to his own use, the same being the money of one Alfred Hirt.

8. Deceiving the chief of engineers as to his whereabouts March 2, 1897.

9. Conspiring to defraud the United States out of $230,749.90 and $345,000.

10. Causing two fraudulent checks for $230,749.90 and $345,000, respectively, to be paid to the Atlantic Contracting Company. (This last offense is specified under each of charges 2, 3 and 4.)

Thus the defendant was convicted by the court-martial of nine, or perhaps ten, separate and distinct offenses, growing out of wholly distinct and separate transactions, and for the most part not of the same class or category of crimes. Several of them are purely military offenses,

the ones charging deception of the chief of engineers; but others, one, two, three, four, nine and ten, as above numbered, are each of them civil offenses as well.

The court-martial assessed a lumping sentence for all the different offenses embraced in the sixteen specifications. The Attorney-General, in his opinion to the President, recommended that the verdict of the court-martial be set aside as to the first eight offenses (twelve specifications), because the findings were not supported by the evidence. The President adopted the recommendation, disapproved the findings indicated, and approved them as to one specification under each charge (the two fraudulent checks above named), BUT LEFT THE ORIGINAL SENTENCE OF THE COURT-MARTIAL TO STAND UNALTERED.

It is submitted that the entire sentence is void.

It at once became no longer the judgment of the court-martial, and it should have been referred back to that body to get its sense as to the *quantum* of punishment, which, in its opinion, should have been meted out to the accused for the single offense of which he was finally, lawfully, adjudged guilty.

In Winthrop on Military Law (2d Ed.), at page 695 *et seq.*, is to be found a discussion of the grounds upon which the reviewing authority should refer the proceedings of a court-martial back to that body for revision, and among those given are "for errors of law or fact," "or of judgment or discretion," and speaking under that head the author says: "Such are mainly errors in the "substance of the findings or sentence, as that the find-"ings, or some of them, are not warranted by the evi-"dence." *Ibid.*, 696. In the present case the only proper mode of procedure was to send the case back to

the court-martial, with the improper findings eliminated, with the direction to the court to reconsider its sentence, and assess such punishment against the prisoner as the findings approved by the reviewing authority should, in the discretion of that court, warrant.

The objection to this procedure, urged below, that the members of the court-martial were widely scattered, should have no weight, because, first, if it be the law that the sentence should be re-committed to them, the *inconvenience* cuts no figure; and, second, five of the original thirteen members would have sufficed to reaffirm or modify the original sentence.

Manual for Courts-Martial, page 10, Par. 6.

To allow the original sentence to stand after overturning the great majority of the finding was a clear invasion by the reviewing authority of the exclusive province of the court-martial. It was, in effect, *to increase*, by executive order, the punishment awarded by the court.

It will be contended, doubtless, that, admitting the twelve counts to be bad, or unsupported by the evidence, and therefore not capable of supporting any sentence, there yet remains a count, viz: charge 4 and its specification, the punishment for which is discretionary, and which is adequate to sustain the entire sentence awarded; and that therefore under the common law rule and the rule announced by this court, the judgment will not be disturbed.

Pretermitting, for the present, the answer that the count on the 62d article of war is bad, as shown elsewhere in this brief, and itself not capable of supporting any sentence; and passing, also, for the present, the further answer that, inasmuch as all of the rejected twelve speci-

fications manifestly belong under specific articles of war other than the 62d, and hence cannot be charged or punished under that article, it is insisted that the rule above referred to can have no application to this case, because its reason here fails, and hence its application also fails.

Formerly the rule of the common law was that a general judgment for the crown, on an indictment containing several counts, one of which was bad, cannot be reversed on error if there remain one good count capable of supporting the sentence. The rule was based on the presumption that, even though the jury should convict on a bad count, the *nisi prius* judge (or King's Bench), in imposing sentence, considered only the good count and graded the punishment accordingly. This rule was strongly assailed in the great case of *O'Connell et al.* v. *The Queen*, 11 Cl. & F., 155.

The judges of England, having been called to the bar of the House, delivered their opinions on the point, and a majority, composed of Tindal, Ch. J.; Patterson, Maule, Williams and Coleridge, J. J.; and Barons Gurney and Alderson, were for affirming the rule, while Mr. Justice Coltman and Baron Parke were opposed.

In the House the vote stood that such a judgment was bad. Lords Cottenham, Campbell and Denman opposing the judgment; the Lord Chancellor (Lindhurst) and Lord Brougham affirming its validity. The fact that the great majority of the judges held the judgment to be good, while the vote of the law lords stood three to two in overruling them, has much impaired the force of the decision in this country. Moreover, a strong political reason no doubt had its influence with the law lords.

The case is very valuable, however, because of the elaborate arguments by learned lawyers, and because, in the 271 pages of the report, everything that can be said for or against the rule is to be found.

It should be remarked that the rule is highly technical, and rests solely on a presumption of law, which, admittedly, in many cases, may be directly opposed to the fact. Baron Alderson confesses that there are objections to the rule. "I am not insensible (says he, at "page 287) that some of the difficulties stated are real; "and if the rule of the criminal law applicable to such "cases must of necessity be a perfect rule. * * * "the argument is well founded. * * * My answer "to them all is this, the law proposes not a perfect rule, "but being human, and therefore imperfect, must choose "between conflicting inconveniences; and I think, in the "rule which it has adopted, it has chosen the least."

The limits of the rule and its reason are thus laid down by Ch. J. Tindal, after stating that anciently there was but one count allowed in an indictment for a felony, but latterly the practice had grown up of alleging the same offense in varying counts to meet the possible proof.

"In no case, however, was it ever known in practice "that the two counts of the indictment contained two "different charges of felonious cuttings and woundings: "but one *corpus delicti* only, under two different de- "scriptions. And if the prosecutor in any charge of "felony should offer evidence tending to prove two dis- "tinct charges of felony, he would be stopped imme- "diately by the presiding judge, and directed to make "his election upon which single charge of felony he in- "tended to proceed. Now, suppose, in the case last put

" of the two counts for the same offense, a general ver-
" dict of guilty, a sentence of imprisonment, with hard
" labor for twelve calendar months (which is a discre-
" tionary punishment), and after the sentence passed, it
" should be discovered that one of the counts in the in-
" dictment was defective, in consequence of the omission
" of some necessary averment, and a writ of error should
" be brought, it would surely be against all principle
" both of law and reason (for as to any decision in sup-
" port of such a doctrine none can be found) that the
" judgment should be reversed and the party who had
" been convicted on the indictment discharged from all
" punishment for his offense.

" It must, indeed, be conceded that the practice in the
" case of a prosecution for a misdemeanor so far differs
" from that in a prosecution for felony, that there may be
" (though it is not usually the case) several counts for
" distinct offenses contained in one and the same indict-
" ment. In that case the prosecutor is not always put
" to his election as in the case of felony; but the trial
" may proceed and the sentence may be passed for sev-
" eral offenses distinct from each other. But the conse-
" quences, so far as relate to the present subject of
" inquiry, appear to be the same, both in the charge for
" felony and the charge for misdemeanor. The moment
" the discretionary punishment is pronounced by the
" judge, whether it be upon a single offense described
" differently in various counts of the indictment, or for
" divers and distinct misdemeanors charged in different
" counts, that discretionary punishment, so awarded by
" the judge, stands in the place of the fixed punishment
" in the case of the felony. And the court of error has
" no more right to presume or to intend that any part

"of the discretionary punishment in the case of misde-
"meanor has been awarded in respect of an insufficient
"count, than in the case of felony to presume that the
"fixed punishment has been given upon a defective
"count where there is a valid count to support it."

The United States courts have followed the rule contended for by the majority of the judges of England, and this Court in several cases has announced the same principle.

A typical decision is that of *Claassen* v. *U. S.*, 142 U. S., 140.

In that case there were some forty counts in an indictment charging the defendant with embezzling the securities of a national bank of which he was the president. The district attorney elected to go to the jury upon eleven of the counts. The jury acquitted the defendant of six counts and found him guilty specifically of each of the remaining five. The defendant was sentenced by the trial judge to a term of six years in the penitentiary—the punishment prescribed by the statute under either count being not less than five or more than ten years.

Mr. Justice Gray delivered the opinion of the court; held the first count good; and without going into the remaining counts, stated the rule to be that on a conviction on several counts in an indictment, and a sentence which did not exceed that which might be given on any one count, if any count were good on error, the court would not reverse.

The learned justice stated the principle to be that in the *absence of anything in the record to show the contrary, the presumption of law is that the court awarded sentence on the good count only.*

The rule has been very generally adopted also by the states in our Union; but it is to be noted that in all jurisdictions where followed, the law or the practice is for the jury to find the guilt and for *the court to impose the punishment;* or else the jury finds a general verdict of guilty, under the instructions of the court, and assesses the punishment. In the former class, the presumption is, as above stated, that the court awards sentence on the good count only; in the latter, that the jury in its general verdict ignored the bad counts. This latter proposition is, however, not well supported by the authorities.

But a diligent search has failed to discover a single case in which, the jury having found a several verdict of guilty on good and bad counts alike, and having assessed either a several or a collective sentence on all, the sentence has been upheld on appeal or error. It is believed no such case exists. On the contrary, in jurisdictions where such practice obtains, under the given conditions, the judgment has been reversed. This is as it should be on principle; since the presumption spoken of in the Claassen case, *supra*, cannot be indulged, for the very obvious reason that it would be contrary to the fact shown by the record, and *cessante ratione legis, cessat ipsa lex.*

In the case at bar, the record affirmatively shows Captain Carter to have been severally found guilty on each of sixteen specifications and on each of four charges. It shows affirmatively that the court-martial awarded a lumping punishment of fine, imprisonment, dismissal and degradation. Can it be presumed that, having found him guilty severally on each of sixteen counts, the court-martial sentenced him only on four? That would be to say, that the military tribunal specifically found him guilty of having committed each one of ten crimes, and

then (without pointing out which ones) sentenced him only for two; surely there is no other instance, in our law of the present day, in which a legal fiction is permitted to falsify a plain record.

In Missouri where, in all crimes save murder in the first degree, the jury assesses the punishment, one Dooley was convicted on an indictment charging, in two counts, burglary and larceny, and the jury assessed the punishment on the burglary count at three years, and on the larceny count at two years in the penitentiary. On appeal the Supreme Court held the larceny count was bad and that the burglary count would not sustain the judgment, though the maximum punishment for burglary exceeded five years.

State v. *Dooley*, 64 Mo., 146.

In *Wood* v. *The People*, 59 N. Y., 117, the plaintiff in error was indicted in five counts for perjury. There was a general verdict of guilty. As to numerous assignments of perjury in the various counts, there was no evidence to show the materiality of the alleged perjury testimony to the issues in the original case.

The Court of Appeals of New York held the general verdict bad, and reversed the case.

Say the court, on page 122:

"If, therefore, there was a failure to show, in respect "to any one of the assignments of perjury, that the "matter embraced therein was material, the conviction "must be reversed; otherwise, as the court cannot know "upon what ground the jury proceeded, the defendant "may have been convicted upon an assignment of perjury "which related to testimony not material to the case. "We have been referred to cases which hold that judg-

"ment will not be arrested upon a conviction for perjury "where the indictment contains in one count several as- "signments, some of which are good and others defect- "ive. (*People* v. *Curling*, 1 J. R., 320; *Same* v. *Has-* "*call*, 6 N. H., 452.) It will be presumed, in such a "case, that the jury disregarded the defective assign- "ments and proceeded upon the substantial and sufficient "averments in the indictment. But when the attention "of the court on the trial is specifically called to the "question and the judge refuses to withdraw from the "consideration of the jury those assignments which are "defective in form, or which have not been sustained by "proof, and exception is taken, the court cannot disre- "gard the error."

The reasoning in this last opinion is directly applicable to the case at bar. How could the President know upon which specification the court-martial based its sentence? Capt. Carter was found guilty under the 61st article of war of making false reports intending to deceive his chief (specifications 9 and 22, charge 3). Who can say that he was not cashiered for conduct unbecoming an officer and a gentleman for those offenses? Yet the President declared he was not guilty of them.

See,

Op. Atty. Genl., Sept. 29, 1899.

He was found guilty, under charge 2, of specifications 8, 9 and 10, for allowing fraudulent accounts for guide piling in favor of the contractors, and as to these the President held him innocent; yet the court-martial may have assessed the fine of $5,000 for those very offenses of which they pronounced him "guilty." Or, may not the court-martial have considered that, being guilty of these

last offenses, and also of the crime of certifying a false pay-roll (Spec. 7, Ch. 2), he merited one year in the penitentiary? Yet, of all these the president said he was not guilty.

Consider now the case from the standpoint of humane and enlightened jurisprudence. Here was the defendant, an army officer, who had been in charge of great engineering works, suddenly brought to trial before a court of brother officers charged with thirty-seven different specified offenses and crimes, ranging from false statements intended to deceive his chief and the Secretary of War, through perjury, false pay-rolls and fraudulent claims, to embezzlement; running back, some of them, six years; all of them involving such a degree of moral turpitude certainly, as, in their bare recital, to arouse the indignation of the members of the court-martial. Nor was this feeling at all diminished by the plea of limitations interposed as to seventeen of these offenses, barred by their very affirmative allegations. Can this court infer nothing from the presence of these seventeen charges, preferred in violation of the 103d article of war?

The record shows that the trial lasted four months. The first charge was conspiracy. Is this court precluded from an examination of petitioner's exhibit "A" that it may not see how these four months were employed by the prosecution in an effort to show conspiracy? How the accused's private papers were seized and put in evidence against him in spite of the decision of this court in *Boyd* v. *U. S.*, 116 U. S., 616? How the defendant's whole life from 1885 was ransacked? These are unfortunately only "irregularities" not reviewable in this proceeding. But this court can see from the record that of thirty-seven alleged offenses, thirty-three were either

barred or there was no sufficient evidence on them to sustain a verdict of guilty. This court can also read in the record that twelve of the guilty findings were set aside by the President. And if the court may not look into the evidence to see what testimony was let in by the court to sustain these findings, it may yet infer that there must have been some testimony adduced in their support.

In Bishop on Crim. Pro., Par. 1015, it is said:

"If one of several counts is bad the court has no right "to receive evidence upon it against the objection of the "defendant. Properly it ought to be quashed, but if "it is not, and the court refuses to exclude evidence ap- "plicable only to it and to direct the jury not to base any "finding upon it, a general verdict of guilty on the in- "dictment should be set aside."

In *State* v. *Hinckley*, 4 Minn., 345, defendant was indicted for the larceny of certain bank notes and also of certain gold coin. It is not clear from the report whether the indictment was in two counts, or both offenses laid in one count. There was a general verdict of guilty. It appeared that one portion was fatally defective, but that evidence tending to support it was received over defendant's objection.

In reversing the judgment the Supreme Court say, at p. 363: "And even had it appeared that evidence was "introduced to sustain that part of the charge well laid "in the indictment, it would be impossible for the court "to say whether the jury would have found their verdict "upon that alone, without also considering the improper "evidence."

In Wharton on Crim. P. & P., Par. 771, it is stated: "On the other hand, there are cases in which no such

"presumption can be made (the presumption that the "verdict of the jury attached only to the good counts, "and that the prosecution had withdrawn the bad). "Suppose that the bad count is for an offense substan- "tially different from the good count. Suppose that "evidence calculated to influence the jury on the good "count, but inadmissible under that count, was admitted "under the bad count. In such case, after a general "verdict of guilty, there should be a new trial, or after "a judgment on such verdict there should be a reversal; "the reason for such action being that the result was "reached by the introduction of a wrongful element."

Here was surely the "introduction of a wrongful element," of which Dr. Wharton speaks in the above quotation; here were the bad counts on which evidence was received, and which according to Dr. Bishop should cause the verdict to be set aside. In court-martial proceedings there is no such thing as a motion for a new trial, a motion in arrest, a request for instructions, or the saving of exceptions. The President has acted as the appellate court, and he has pronounced twelve of the counts bad, not supported by the evidence.

"Suppose that evidence calculated to influence the jury "on the good count, but inadmissible under that count, "was admitted under the bad count." What then? According to Dr. Wharton, after judgment, a reversal. No presumption that the jury assessed the punishment on the good count only, nor even that the court pronounced sentence disregarding the bad counts. Suppose the court-martial permitted evidence to show the defendant had knowingly made a certain false voucher in favor of the Atlantic Contracting Company for certain guide piling in January, 1897, and another in March, and

another in July (Charge 2, Spn's. 8, 9 and 10), and suppose this very Atlantic Contracting Company was alleged to be the corporation for the benefit of which the defendant was charged (Charge 1, Spec. 2) to have previously conspired and in the execution of the same contracts, to defraud the government. Who can say that the conviction on the conspiracy charge was not "reached "by the introduction of a wrongful element?"

To sum up the argument. As the matter stands the court-martial found the accused severally guilty on each of sixteen counts, charging ten distinct and dissimilar offenses, some of them punishable by a fixed punishment (dismissal), some by punishment fixed within limits (fine or imprisonment or such other punishment as the court-martial might see fit, and some by a purely discretionary punishment short of death. The court-martial imposed a lumping punishment for all of these offenses. The President disapproved the finding of the court as to twelve counts, charging eight distinct offenses, and allowed the original sentence to stand. The sentence became at once no longer the sentence of the court-martial, for no presumption can be indulged that it imposed the entire punishment on the four counts allowed to stand, because the record speaks to the contrary. Hence the President by his action invaded the province of the court-martial and increased the amount of the sentence. The sentence therefore is void.

It is void in another aspect. Some of the counts set aside were closely allied to the conspiracy count under charge 1; evidence under such counts would strongly tend to influence the court-martial in deliberating on the conspiracy charge; but such evidence became no longer admissible after its proper count was set aside. Thus a

wrongful element was introduced into the case adverse to the defendant, and the punishment no longer represents the judgment of the court-martial, the tribunal to which alone belongs the power of fixing the punishment.

To illustrate the argument. The nearest analogue to a court-martial in our municipal law is the trial court and jury in criminal libel cases, in those jurisdictions where the jury is by statute made the judge of the law and the fact and also fixes the punishment; as, *e. g.*, in Missouri and Illinois. The court-martial corresponds more or less closely to the jury in such cases, and the reviewing authority to the judge. The sentence of the jury has no validity until embodied in the judgment by the court; so the sentence of the court-martial is inchoate until approved by the reviewing authority. The judge, like the reviewing authority, has the power to set aside the verdict in whole or in part, but no power in either case to increase the punishment. The analogy is not perfect, and I am aware that "an illustration is no argument," but perhaps the comparison will serve to clear up the understanding in this matter, which is without precedent. In the parallel case assumed, suppose there were an indictment for criminal libel in two counts, charging separate and unconnected libels, and the jury should find the defendant severally guilty of each count and impose a sentence on each of six months in jail—the maximum for libel being one year. Would the trial judge refuse to arrest the judgment if one of the counts were fatally defective? Would an appellate court fail to reverse in such a case?

This is the Missouri case, *State* v. *Dooly*, *supra*, and there the court held the judgment bad.

Would the rule change if the jury, having found a

several verdict of guilty, had imposed a lumping sentence for both counts?

In neither event, it is submitted, could an appellate court say that the jury disregarded the bad count, for the record affirmatively shows the contrary.

CONCEDING, FOR THE SAKE OF ARGUMENT, THAT THE RULE IN THE UNITED STATES COURTS OBTAINS IN COURTS-MARTIAL, STILL THIS SENTENCE CANNOT BE UPHELD UNDER CHARGE 4.

But it is submitted that the learned judges of the Circuit Court were in error in the assumption that the sentence could lawfully be sustained under the fourth charge.

It is shown elsewhere in this brief that the specification under the fourth charge was wrongly laid under the 62nd article of war; and since as to all the other specifications laid under other articles the court-martial failed to find that any of them did not charge, or the proof did not sustain, a violation of the specific articles under which they were laid, but did show a violation of the 62nd article (as the court might lawfully have done, Manual, p. 48, Sec. 4), it follows that the fourth charge goes out of the case, and the sentence must stand or fall under the other charges. Whether or not it can stand under charges 1, 2 and 3 is discussed as a constitutional question elsewhere.

There is yet a further objection to the assumption that the 4th charge can be utilized to support this sentence.

It is shown elsewhere in this argument that the rule of military law requires all offenses to be laid under the specific article to which they belong, and that it is error

to lay an offense under the 62nd article if it properly belong under some other, as, *e. g.*, while desertion is certainly "to the prejudice *of good order and military* "discipline," the offense cannot be charged under article 62, but must be laid under article 38.

Manual, p. 15, Sec. 3.

Now, the offenses of which the President declared Captain Carter innocent, but as to which the court-martial found him severally guilty, some were charged under article 69 and some under article 61. Some in their statement involved that kind of moral turpitude for which the 100th article requires the peculiar punishment of degradation, which cannot lawfully be inflicted under article 62, as elsewhere shown; and some are punishable peremptorily by dismissal. If, then, it be assumed that the court-martial affixed to these disapproved findings of guilty on these particular counts any portion whatever of the lumping sentence (and to presume otherwise would be to assert that their findings of guilty were meaningless and absurd), it necessarily follows that such portion of the sentence cannot find its support under charge 4, which is a violation of article 62. In other words, to say that such portion of the sentence is supported by charge 4 is to do what the law military expressly forbids.

The result is that in no aspect can the sentence as approved be viewed as the sentence of the court-martial. It is a different sentence from that imposed; and since its difference does not consist in remission or in mitigation, it must consist in an increase. There seems to be no logical escape from this result.

If it be an increase, it is void *in toto*.

IV.

THE PUNISHMENT BY FINE AND IMPRISONMENT WERE, EACH OF THEM, ILLEGAL AND VOID, BECAUSE INFLICTED AFTER CAPTAIN CARTER HAD CEASED TO BE AN OFFICER OF THE ARMY AND HAD PASSED BEYOND THE JURISDICTION OF A COURT-MARTIAL.

By command of Major General Miles, by direction of the Secretary of War, Captain Carter ceased to be an officer of the army on the 29th day of September, 1899.

The order is:

"By direction of the Secretary of War, Captain "Oberlin M. Carter, Corps of Engineers, ceases to be "an officer of the army *from this date*, and the United "States Penitentiary, Fort Leavenworth, Kansas, is des- "ignated as the place for his confinement, where he will "be sent by the Commanding General Department of "the East under proper guard.

"By command of Major General Miles.

H. C. CORBIN,
Adjutant General."

Hence, Captain Carter, as an officer in the military service, ceased to exist on that date.

Having ceased to be in the military service, he is no longer amenable to military jurisdiction.

Colonel Winthrop, in his Military Law, says:

"It is the general rule that a person is amenable to "military jurisdiction only during the period of his "service as an officer or soldier. Thus, in the case of "an officer, the jurisdiction commences with the accept- "ance of his appointment or commission, or where

"originally appointed by state authority with his muster "(or reappointment) into the service of the United "States, and ends with his death, the acceptance of his "resignation, his dismissal, etc. Or, if a volunteer "officer, his discharge, his dismissal, or muster out, "etc."

1 Winthrop, Mil. Law, page 116 (2d Ed.).

The author then states the amenability of an officer to the military jurisdiction ceases even during absence on leave.

1 Winthrop, Military Law, pages 120–121 (2d Ed.).

When a person enters the military service he becomes a member of a class separate and distinct from persons in civil life. His official relation invests him with what might be termed an artificial person distinct from his natural person. He becomes a legal entity, subject in general to a different jurisdiction and deprived of valuable rights accorded to persons in civil life. His official relation, as Colonel Winthrop says, begins with his commission and ends with his discharge. He is as much a creature of that relation as a corporation organized under statute law. Dismissal from that relation is official death, the same as the revocation of a charter of the corporation or its dissolution is corporate death. All actions of every kind and nature *abate*, and the court loses jurisdiction either to try, sentence or punish.

While in the military service the accused was entitled to the benefits and advantages of that relation and likewise subject to its pains and penalties.

By the termination of that relation he no longer has

the right to its benefits and advantages. He is likewise relieved of its pains and penalties.

The accused must either be a citizen or a person in the military service. He cannot be a civilian for one purpose and a member of the army for another purpose.

It will not do, therefore, to say that as the court-martial had jurisdiction at the time of the trial, the military authorities now have jurisdiction to deprive the accused of his liberty under the sentence imposed.

To hold that he is further subject to military custody or discipline would be, as observed by Colonel Winthrop, to create a third class—neither civil nor military—a class not provided for by the constitution nor recognized in the law.

It was certainly within the power of the court-martial to make the sentence of dismissal to take effect upon the expiration of the term of his imprisonment, but this it did not do. Prior to being imprisoned he was dismissed from the service and his official relation terminated.

The single question is, what is now the status of the prisoner? Is he a person in the military service or is he a civilian? He is no longer entitled to wear the uniform of his rank, nor is he now in the pay of the military establishment. No pardon or executive clemency of any kind can reinstate him as a military officer. If he is not an officer in the military service, then he is a civilian and no longer amenable to military custody for any purpose whatsoever, either trial, sentence or punishment.

The above contention is wholly in accord with the views of Attorney-General Wirt, who, on the 16th of May, 1821, gave it as his opinion that military punishment could not be continued after the 1st of June, 1821,

as to those who did not then constitute a part of the peace establishment under the act of March 21, 1821.

The attorney-general, in his opinion, says:

"I have considered the question submitted to me on "the 14th and am of the opinion that, from and after the "1st day of June next, when the act of the 2d of March "last takes effect, military punishment cannot be in- "flicted or its infliction continued on any who do "not constitute a part of the peace establishment under "that act, since by the twelfth section of the act all be- "yond this number are expressly and, without exception, "required to be discharged from the service of the "United States. Those who are not soldiers on that "day must be citizens, and in the latter character cannot "be subject to military law—at least for the completion "of a punishment which, in its character, looks to their "restoration to the military service, when the punish- "ment shall be over as sentences to confinement, hard "labor, etc. There is color for the opposite opinion, "but I hold this to be the safest and soundest on the law "as it stands."

5 Opinions Attorney-General, p. 735.

See, also,

The Opinion of Attorney-General Cushing, rendered January 20, 1857, 8 Opinions of Attorney-General, p. 328.

Ex parte Henderson, 11 Federal Cases, p. 1067.

There is no authoritative decision to the contrary.

It is true it has been held that the expiration of the term of enlistment of an enlisted man would not prevent the trial and the punishment of an offense after the term of enlistment had expired.

In re William Bird, 3 Fed. Cases, p. 425.
In re Walker, Am. Jurist, Vol. 3, p. 281.
In re Bogart, 8 Fed. Cases, 796.
Barrett v. *Hopkins*, 7 Fed. Rep., 302.

The case of an enlisted man whose term of enlistment had expired, *but who has not received his discharge from the military service*, is entirely different from the dismissal of an officer which, *ipso facto*, terminates his relation to the service.

What has been said by the judges in those cases affecting the question now under consideration is purely *obiter*, and much of their reasoning is on entirely untenable grounds. For instance, in *Barrett* v. *Hopkins*, *supra*, the learned judge reasoned that as the offense was committed while the accused was in the service, no change in his status could oust the jurisdiction of the military authorities to try and punish him for that offense under the general rule of law that when a court once acquires jurisdiction it retains jurisdiction for all subsequent purposes.

That rule, it is submitted, has absolutely no application.

By dismissal from the service, all proceedings against a dismissed officer ABATE in the same manner as an action against a natural person dying *pendente lite*, or against a corporation whose corporate existence is cut off by its dissolution.

As said by Mr. Justice FIELD: "With the forfeiture "of its rights, privileges and franchises, the corpora- "tion was necessarily dissolved, as the decree adjudged. "Its existence as a legal entity was thereupon ended. It "was then a defunct institution, and judgment could be

"no more rendered against it in the suit previously com-
"menced than judgment could be rendered against a
"dead man dying *pendente lite*. * * * The prolong-
"ation of the corporate life for this specific purpose as
"much requires special legislative enactment as does the
"creation of the corporation."

First National Bank v. *Colby*, 88 U. S., 609.

"That a petition for a writ of mandamus to a public
"officer of the United States abates by his resignation of
"his office has been determined by a series of uniform
"decisions of the Supreme Court, and has for years been
"considered as so well settled that in many of the cases
"no opinion has been filed and no official report pub-
"lished."

Warner Valley Stock Co. v. *Smith*, 165 U. S., 28.
U. S. v. *Boutwell*, 84 U. S., 604.

The same rule of law applies here.

A reference to the legislation by Congress in relation to dismissed officers clearly shows that the views here contended for are of such force as, in the opinion of Congress, to make necessary a special statutory enactment, that dismissal or discharge from the service shall not abate the proceeding, but that the officer so dismissed or the soldier so discharged shall continue to be liable to be arrested and held for trial and sentence by a court-martial for an offense provided for in the 60th article of war in the same manner and to the same extent as if he had not received his discharge nor been dismissed.

See

60th Article of War.

Colonel Winthrop, in his Military Law, expresses the opinion that that clause is clearly unconstitutional, because it subjects civilians to trial by court-martial.

See

Winthrop's Military Law, pp. 122–123.

The reasons given for his views are that the statute "must be regarded as retaining these persons, notwithstanding that they have become civilians, in the army, "for a temporary or special purpose," and that authority to govern cannot be extended to the discipline of soldiers, "after they have been legally separated from the army;" that the constitution "recognizes no third class which is "part civil and part military—military for a particular "purpose or in a particular situation, and civil for all "other purposes and in all other situations;" and that Congress cannot create such a class without "disregard "of the letter and spirit of the organic law."

I Winthrop's Military Law, pages 144–145 (2d Ed.).

The opinion of Colonel Winthrop as to the unconstitutionality of the statutes referred to is undoubtedly well founded.

In the Henderson case (*supra*) the statute subjecting contractors with the army to the jurisdiction of courts-martial was expressly held unconstitutional.

Ex parte Henderson, 11 Federal Cases, p. 1067.

If those statues are unconstitutional, then *a fortiori* is the detention and restraint of an officer dismissed from the service unauthorized and illegal.

If, as claimed by the government, the offense is prop-

erly chargeable under the 62d article, then there is no statute whatsoever authorizing trial, sentence or restraint after an officer has been dismissed from the service.

The statute applies only to offenses under the 60th article of war; and the fact that Art. 60 specially provides for trial and sentence after discharge or dismissal, shows that Congress did not intend or contemplate that the terms of Art. 62 should cover the case of an officer after dismissal.

Nor can it be said that in suffering the punishment of imprisonment the accused is not in the custody of the military authorities. He is now in the actual custody of the warden of the United States penitentiary and is held by him under and by virtue of the sentence of the court-martial.

If that sentence be void or irregular, or the court-martial has lost its jurisdiction by the *abatement of* the proceedings, it furnishes no authority for his detention.

It may be contended that the practice of dismissing an officer from the service and imprisoning him after such dismissal is sanctioned by the "laws and usages of "war."

As to such a contention it need only be said that the "law and usages of war" cannot overrule or override constitutional provisions.

As said in the Milligan case:

"It can serve no useful purpose to inquire what those "laws and usages are, whence they originated, where "found and on whom they operate; they can never be "applied to citizens in states which have upheld the au-"thority of the government and where the courts are "open and their process unobstructed."

In the case at bar, the prisoner having been dismissed from the military service, his punishment can have no relation to the good order and discipline of the military service. And under the grant of power to Congress "to "govern the land and naval forces" there is no authority to continue military punishment upon a person in civil life.

Since the decision in the Milligan case (71 U. S., 1), it would hardly be contended that a person in civil life could be held a prisoner by virtue of a sentence imposed by a court-martial.

V.

THE SENTENCE OF THE COURT IS BEYOND ITS POWERS AND ILLEGAL AND VOID, BECAUSE THE PUNISHMENT ASSESSED THEREIN EXCEEDED THE MAXIMUM PUNISHMENT FIXED BY THE PRESIDENT OF THE UNITED STATES IN ACCORDANCE WITH THE LAW.

It is alleged in the petition in this case that by the act of Congress approved September 27, 1890, the President is authorized to fix by general order the limits of punishment for certain offenses by courts martial.

It is further alleged that pursuant to that authority the president, by an order dated March 20, 1895, fixed the maximum punishment for a violation by an enlisted man in the army of the United States of the 60th article of war, and for a violation by such person of the 62nd article of war by embezzlement of more than $100, at a term of four years' confinement at hard labor, under either article; and thereafter, on October 31, 1895; the president of the United States, in accordance with the terms of said acts of Congress, prescribed that the said maximum

limit should extend to all such violations, whether by officers or enlisted men of the army. Said last-named order is found in the army regulations promulgated by the order of the president, on October 31, 1895 (*supra*), as follows:

"Art. 938. Whenever, by any of the articles of war, "punishment is left to the discretion of the court it shall "not, in time of peace, be in excess of a limit which the "president may prescribe. The limits so prescribed are "set forth in the Manual of Courts-Martial published by "authority of the Secretary of War."

Petitioner further averred that the limits above set out are prescribed in said manual and were in full force and effect when the court-martial passed its sentence of five years' imprisonment on said Carter.

These allegations are not traversed in the record.

A comparison of dates shown by the record will also disclose that when the alleged offenses were committed said prescribed limits were in full force.

It was urged below and will doubtless be pressed in this court that the limits above mentioned are applicable only to enlisted men; but no such limitation appears in the orders, and it is submitted cannot be read into them by judicial construction.

The act of Congress allows the President to prescribe limits, in certain cases, to all punishments by courts martial; the purpose undoubtedly being to secure uniformity of sentences. Under that authority, the President caused to be published (March 20, 1895) an order fixing such limits, but restricting them in their application to enlisted men only. Later, the same authority (the President) caused certain army regulations to be promulgated

(October 31, 1895), in which, without regard to rank, the limits are made of universal application in all cases where the articles of war leave the *quantum* of punishment to the discretion of the military tribunals.

It is perhaps unnecessary to remark that this army regulation has the force of an act of Congress.

If there be any doubt as to the construction of these two orders, that doubt, under well-known principles of statutory construction, should be resolved in favor of the prisoner; and this, moreover, is strictly in accordance with the rules of grammatical construction, for "limits" manifestly refer to the *quantum* of punishment and not to the class or status of the offenders.

It is suggested that there is no reasonable doubt. The intention manifestly was to extend the application of the original order to officers, else what reason for existence has Sec. 938, above set out?

The order of March 20, 1895, was in operation, and there was no need to repeat it in the army regulation. Or, if there were such necessity then why was not the application restricted in terms to enlisted men, or why was not the original order simply repeated at length in the regulations?

If, then, these "limits" are applicable to the case of Captain Carter, the result is that the entire sentence of imprisonment is void, because in excess of the power of the court-martial to inflict. This is the rule announced by the better reasoned cases. Indeed, in nearly every case announcing a different doctrine it will be found on examination that there existed some *statute which authorized the court* (*nisi prius* or appellate) *to cut down the term to the maximum allowed by law.* Church has fallen

into the error of stating the weight of authority to be that the sentence may be so reduced. The statement is true only when the statutory provisions above mentioned are taken into consideration.

The utmost extent of the doctrine under common-law principles is that where the judgment in a criminal case consists of more than one kind of punishment, the different kinds being readily severable, and one element is void, for any reason, an appellate court may set aside the void portion, leaving the valid portion to stand, as, *e. g.*, a sentence consisting of fine and imprisonment, where the trial court had no power to inflict imprisonment

In *Howell* v. *State*, 1 Or., 241, it appears that the defendant in the trial court was sentenced to "one year's "solitary confinment, and kept at hard labor in the peni- "tentiary of this state." The statute provided that no convict should be sentenced to solitary confinement to exceed twenty days at one time.

In reversing the case the court say: "This court, then, "must take the judgment of the court below as it is. We "have no power to take from, add to, or modify it. "It must speak for itself, and stand or fall, as in law it "is authorized or unauthorized."

A judgment of imprisonment with solitary confinement would seem to be more easily severable into two component parts, the one lawful, the other unlawful, than a term of imprisonment longer than that allowed by the statute; and if the court could not find power to declare the solitary confinement part void, leaving the imprisonment to stand, *a fortiori*, could it not remit one or more years from an excessive term of imprisonment.

In *State* v. *Child*, 42 Kan., 611, the defendant below

was charged with an assault feloniously made with a deadly weapon, but the indictment failed to allege a specific intent to kill, etc. Defendant was sentenced on conviction as for a felony. It was suggested on appeal that the Supreme Court might change the punishment so as to conform to that denounced against an assault and battery, which latter was sufficiently alleged in the indictment. This the court declined to do, and reversed the case. The opinion was written by Judge Johnson, with whom concurred Judge Horton, one of the ablest of western jurists.

In *ex parte Page*, 49 Mo., 291, which was a *habeas corpus* case, petitioner had been sentenced to ten years in the penitentiary on an indictment for grand larceny, the maximum allowed by statute being seven years. The Supreme Court discharged petitioner. Say the court through WAGNER, J., a careful and conscientious judge, at page 293: "It has been suggested that if the prisoner "is not discharged, we should reduce the term so as to "bring it within the limit prescribed by statute. * * * "We are not aware of any authority by which we can "undertake to modify a criminal sentence."

In *Graham* v. *Weeks*,, 138 U. S., 4 1, Graham had been sentenced by the state court of Wisconsin for thirteen years, the maximum allowed by statute being ten years. On *habeas corpus* the Supreme Court of Wisconsin declined to discharge, holding the overplus of sentence to be severable.

On error to this court, it was held that no Federal question was prescribed, and the judgment of the state court was affirmed.

Mr. Justice Field, however, in his opinion stated: "It is undoubtedly the general rule that a judgment

"rendered by a court in a criminal case must conform "strictly to the statute, and that any variation from its "provisions, either in the character or the extent of the "punishment inflicted, renders the judgment absolutely "void; but it seems that under the law in Wisconsin, a "judgment in a criminal case which merely exceeds in "the time of punishment prescribed by the sentence that "which is authorized by law, is not absolutely void but "only erroneous. * * *"

It is a fair inference from the above language of Mr. Justice Field that, personally at least, that eminent jurist believed a sentence of imprisonment in excess of the amount allowed by law is totally void. And this would seem to be consonant with reason. The judgment is for a specified term of years; it is for an entire and indivisable thing—a period of time. To sever from that period a given portion is to change and make different the adjudication of the trial court. There is no logical parallelism between such a judgment and one consisting of two parts, one valid and one beyond the power of the court to render; as, *e. g.*, a fine and imprisonment, the statute denouncing only fine. In such case the sentence of imprisonment is a mere *brutum fulmen*, possessing no validity whatever, in whole or in part, and may be entirely disregarded.

This position is not in conflict with the decision of this court in the Pridgeon case, 153 U. S., 48. There the question was whether the addition of the phrase "hard labor" to a sentence of imprisonment, the statute providing only for imprisonment, rendered the judgment totally void. This court held it did not. But the reasoning proceeded on the fact that, under the law, the trial court, in its discretion, could appoint as the place of

punishment a penitentiary at which hard labor was part of the discipline; and that such provision of the law was thus read into every section of the statute providing for imprisonment in a penitentiary.

VI.

IT STANDS ADMITTED IN THIS RECORD THAT NO EVIDENCE WHATEVER WAS DELIVERED BEFORE THE COURT-MARTIAL TENDING TO SHOW THE GUILT OF CAPTAIN CARTER.

The allegation of the petition is as follows: "Your "petitioner avers that there was no evidence delivered "before said court-martial which tended to show that any "crime whatever had been committed, or which tended "to show that any crime had been committed by the "said Captain Carter; but, on the contrary, all of said "evidence, taken together, affirmatively showed that "there was no *corpus delicti;* and that said Carter was "wholly innocent of any wrong doing. * * *"

The return fails to deny this allegation or any part thereof, and, therefore, by the well-known rules of pleading, the averment stands admitted. This is elementary.

Gould on Pleading, Sec. 98 (5th Ed. Heard).

Stephen on Pleading, Sec. 132 (Andrew's Ed.).

The question here presented, as to whether or not the sentence of a court-martial is void, if there be no evidence whatever tending to support the finding of guilty, is of first impression in the Federal courts. A diligent

search has revealed to the writer but one adjudication on the particular point.

In *People* v. *Townsend*, 10 Abb. New Cas., 169, it was ruled that if there was no evidence at all before the court-martial tending to prove the matters alleged in the specifications, the court-martial had no jurisdiction to punish, and that the matter could be inquired into collaterally.

This would seem to be right on principle, because if no crime has been committed no jurisdiction to punish can possibly attach. Under the cases in this court, three things are necessary to validate the criminal judgment of an inferior tribunal—jurisdiction of the person, jurisdiction of the subject-matter, jurisdiction to pronounce the particular judgment.

If there be no crime committed how can it be said such court had jurisdiction of the subject-matter? The subject-matter in a criminal case *is* the crime. If these three requisites be of equal importance, and two may be inquired into collaterally, why may not the third?

The rule has been invoked as against a committing magistrate, and where the evidence adduced shows that no crime has been committed the prisoner will be discharged.

Ex parte McNutty, 77 Cal., 164.
In re Eberle, 44 Kan., 472.
In re Brandan, 26 Fla., 142.
Ex parte Kearney, 55 Cal., 212.
Ex parte Jackson, 45 Ark., 158.
In re Simon, 13 N. Y. Sup., 399.

If the Republic is to embark on a scheme of territorial aggrandisement; if we are to have a constantly increasing army and navy; if countless alien peoples—Philippinos,

Cubans, Chinese—are to be brought under the jurisdiction of these summary courts, whose procedure is uncouth to the American lawyer and whose power is bounded by such vague notions as customs of the service, martial law and the laws of war, would it not be well carefully to re-examine former procedents to ascertain if they be founded on the bed-rock of American liberty? If so, all will be well with us.

Courts-martial are "inferior courts of limited juris-"diction whose judgments may be question collaterally" say this court in *ex parte Watkins*, 3 Pet., 193, 207; and if so their judgment should not be hedged about with any more safeguards than those of justices of the peace.

Instances are readily supposable where a contrary doctrine would work injustice shocking for enlightened civilization to contemplate. It is common knowledge, for example, that the commanding officer in the Philippines has issued most stringent orders respecting sedition in Manila. That city, as well as the whole Island of Luzon, is under military law, and all persons now on the island are subject to trial by courts-martial or military commissions. Let us suppose a Philippino in Manila is arrested charged with sedition and tried before a military commission, convicted and sentenced to be shot. Suppose the evidence plainly showed that no offense known to the laws of war had been committed. Is there no remedy? If it be said that extreme cases make bad precedents, I point in England to Admiral Byng, shot, as Voltaire said, to encourage the others; in France, to the Duc D'Enghein, whose grave was dug before the court assembled to try him; in the United States to General Porter, to Milligan, to Mrs. Surratt.

The fundamental trouble with this case of Captain Car-

ter is that it was one which never should have been referred to a military tribunal for trial. As remarked before, the crime, if any, was committed, in conjunction with others, civilians, not amenable to the jurisdiction of a court-martial. The civil courts were open; in them all parties, soldiers and civilians, could have been tried by and according to the practice and procedure dear to every Anglo-Saxon, according to the formulas which for centuries our race has struggled to perfect—the common law.

Courts-martial are well enough to try strictly military offenses—conduct unbecoming an officer and a gentleman, cowardice, desertion and the like. But they are utterly unfit, because not intended for, the trial of complicated cases such as that against Captain Carter; unfit, moreover, because they cannot compel the production of books and papers nor the evidence of civilians. How this last hampered Captain Carter it is not for me to say, for it is *dehors* the record; but it is not difficult for this Court to imagine that the defect mentioned may well be fatal to an accused officer, if courts martial are to embark generally on the trial of such cases as this.

In conclusion, with not a little hesitation, and of course with the utmost deference and respect, I venture to suggest as a lawyer who has had much practical experience with courts-martial that the civil courts insensibly have come to regard the decisions of such tribunals as carrying with them too much of the weight of the judgment of a court of general jurisdiction. It was not so in the time of Loughborough in the case of *Grant* v. *Gould*, 2 H. Bl., 69, which was an application for the writ of prohibition to prevent the execution of the sentence of a court martial. The Lord Chief Justice went very fully

into the evidence adduced before the court-martial to ascertain if any material matters had been improperly admitted, and also to see if the evidence supported the finding under the charge, and if the offense of which petitioner had been convicted was a crime under the mutiny act.

If it be said that such practice is impracticable at this day, it may be answered that there is somewhere, between the two, a golden mean.

"I would fain know," said Lord Holt in *Rex* v. "*Whistler*, Holt's R., 215, "when a penalty is inflicted "and a different manner of trial from *Magna Charta* "instituted, and the party offending, instead of being "tried by his neighbors in a court of justice, shall be "convicted by a single justice in a private chamber, upon "the testimony of one witness, if on a consideration of "such a law we ought not to adhere to the letter."

In the constitution of Illinois it is said: "A frequent "recurrence to the fundamental principles of civil gov- "ernment is absolutely necessary to preserve the bless- "ings of liberty."

Ill. Const., 1870, Art. II, Sec. 20.

All of which is respectfully submitted.

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